Petition

81-517

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD SWITLIK and STANLEY SWITLIK,

Petitioners,

vs.

HARDWICKE COMPANY, INC.; SIX FLAGS; GREAT ADVENTURE, INC.; JANE DOE and RICHARD DOE; ARTHUR F. BROWN, Ocean County Sheriff,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Have the Petitioners had a "full and fair opportunity" to litigate in the state courts so as to preclude them without an evidentiary hearing under principles of res judicata and collateral estoppel from maintaining a federal civil rights suit for violation of their first and fourteenth amendment rights where:

(a) one of Petitioners' attorneys during the period of litigation (including trial) was in the employ of the Petitioners' adversary;

(b) the state courts, trial and appellate, never stated their reasons in writing or otherwise for denying Petitioners' claim that the introduction of and reliance on certain of Petitioners' letters, petitions and speeches violated Petitioners' first amendment rights to free speech and to petition; and

(c) the state court whose decision is relied upon for collateral estoppel is the governmental organ accused of the speech and petition impingement.

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vs.

HARDWICKE COMPANY, INC.; SIX FLAGS;
GREAT ADVENTURE, INC.; JANE DOE and
RICHARD DOE;
ARTHUR F. BROWN, Ocean County Sheriff,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit filed in the above noted case on June 8, 1981.

II. CITATIONS TO THE OPINIONS BELOW

The order of U.S. District Court Judge Dickinsin R. Debevoise dismissing[1] Petitioners' civil rights complaint dated July 8, 1981 is without written opinion and unreported (Appendix B). The order does specify that its supporting rationale is the same as is set forth in an oral opinion issued from the bench during Petitioners' request for a preliminary injunction (Appendix C).

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[1] The Third Circuit Court of Appeals sua sponte concluded that the district court rather than dismiss Petitioners' complaint entered summary judgment inasmuch as the Respondents had filed an affidavit listing the times that Petitioners raised the first amendment arguments. *See* Appendix A—pp. 8a-11a, *infra*.

The opinion of the United States Court of Appeals for the Third Circuit No. 80-2174 (3d Cir. June 8, 1981) is also unreported as of the time of the filing of this petition and appears as Appendix A, *infra*.

III. JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was filed on June 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of New Jersey (Trenton) to enjoin the enforcement of a state court judgment of $6,342,872 against Petitioners. The complaint alleged that state proceedings were tainted by the use of constitutionally protected conduct, *e.g.*, speech and petition, against Petitioners; that the judgment was bottomed on the same constitutionally protected acts; and that execution on the judgment would punish the Petitioners for exercising their first amendment rights.

The dispute which the state courts resolved with a multi-million dollar judgment was over the ecological impact the erection of a Coney Island-type amusement park would have on the Pine Barrens of New Jersey. The Petitioners, who own extensive acreage in the Pine Barrens of New Jersey, sold some 820 acres to Respondents for a wild animal theme park. The agreement of sale "obliged the Respondents to preserve the ecology of the premises" (Appendix D at 41a).

When Petitioners learned of Respondents' intent to build a Coney Island-type amusement park, ostensibly under the authority of the "related uses" clause,[2] Petitioners became concerned over the impact to the area's environment.

This environmental concern led them to appear and to speak before the appropriate planning boards, write letters to government officials,[3] and institute a suit for trespass.[4] In the suit for trespass, the Respondents counterclaimed for malicious interference with contractual relations, prospective economic advantage and fraud.

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[2] The agreement of sale provided that the land was to be used "primarily for a wild animal theme park and related uses." Appendix D at 41a.

[3] Respondent claims 46 letters were written and at trial specifically stated that they *did not* contend that the protests were without basis but that the sheer volume showed malice. (Respondents Brief, pages 16 & 17 in the Third Circuit Court of Appeals). For examples of petitioners' letters see Appendix D at pp. 81a-102a. For agency responses see Appendix D at pp. 81a-102a. For agency responses see Appendix D at pp. 103a-109a.

During the state trial courts' fact finding process, an attorney retained by the Petitioners to work on their case, unbeknownst to the Petitioners, switched sides in February 1976 and accepted employment with Respondents creating a secret conflict of interest which persisted until disclosed on June 15, 1976 (Appendix D at pp. 50a-52a, 128a, 129a, 130a). During this period, evidence was actually being taken before Judge Doherty and important tactical decisions were being made.

In finding for the Respondents on their counterclaims and against the Petitioners, the New Jersey Court relied heavily on evidence objected to at trial concerning the Petitioners' exercise of their first amendment rights, *e.g.*, speech and petition. The New Jersey trial court ruled:

> He made numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities both before and after the title to the property was conveyed. He persisted in claiming that his father had access through the original access road even after the settlement of this claim. He purchased the 'Seelig Property' for at least the partial purpose of being in a position, as a neighbor, to make complaints through an alleged trustee. The complaints reinforced his own complaints against Hardwicke. He did not disclose his interest in this property. He participated in the financing of a law suit by the Environmental Commission of Upper Freehold, *et al.*, by furnishing at least some of his

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[4] One of the adverse ecological effects of Respondents' plan was that in executing it they allegedly destroyed some trees on Petitioners' land. Appendix A at 4a.

> money to the plaintiffs for legal expenses. He caused twenty (20) tons of sand to be dumped in a drainage area to the disadvantage of Hardwicke. He appeared before the Planning Board and spoke out in opposition to the location of an Entertainment Park on the Hardwicke property although he had participated in the settlement leading to title closing. He knew that this settlement specifically contemplated such a park. The above activities interfered with and were detrimental to Hardwicke's economic position.
>
> I conclude that many of the above activities taken separately would not be wrongful. Taken together they satisfy me of Richard Switlik's malicious motivations in undertaking them. . . .

Appendix A at pp. 6a, 7a.

Additionally, the trial court refused to permit the Petitioners to prove the verity of their environmental complaints as can be seen from the following colloquy among Petitioners' trial counsel (Wherry), Respondents' trial counsel (Becker) and the court:

> MR. BECKER . . . Well, your honor, I'd like to make clear that I offer these materials in evidence, it's not for the purpose of showing the truth of any allegations contained in these letters but merely for the purpose of showing that the letters were written by Mr. Richard Switlik.
>
> THE COURT: That's all they prove.
>
> MR. WHERRY: So that there might not be any mistake on the record, your Honor, we take the position that, in fact, the information contained in the letters is true.
>
> THE COURT: I assume so.

MR. WHERRY: And we'll go forward and prove it in each regard.

MR. BECKER: I don't know what that has to do with the offer.

Trial Transcript of June 17, 1976 before Doherty, J.

Yet the trial court nevertheless found these complaints to be crucial evidence of malice.

The Court's use of these protests—admitted by respondent and have some basis in fact (see footnote 3)—to establish malice was objected to repeatedly, but no court, appellate or trial, in writing or in any other way dealt with the issue, making it impossible for petitioner to fully and fairly litigate the issue.

Although raised on appeal before the Superior Court of New Jersey, that court, in a per curiam opinion, said nothing of the first amendment issue. It only stated "all issues of law raised are clearly without merit." Appendix D at 126a.

The Supreme Court of New Jersey denied Peitioners' request for certification and this Court denied certiorari. *Switlik v. Hardwicke*, 446 U.S. 929 (1980).

The Petitioners then attempted to raise the issue through the instant civil rights suit. That suit was dismissed without any evidentiary hearing by the Honorable Dickinson R. Debevoise, United States District Court Judge. Appendix B at pp. 18a, 19a.

The dismissal was appealed *in toto* to the Court of Appeals for the Third Circuit which affirmed the district court judgment.[5] This petition seeks review of that affirmance.

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[5] Even though the Court of Appeals recognized that the dismissal of Count Two as well as Count One was being appealed, it erroneously failed to relate the Count Two allegations (conflict of interest of Petitioners' attorney) to its determination of "full and fair opportunity" to litigate. Appendix A at 2a, 3a n.1.

VI. REASONS FOR GRANTING WRIT

I.

THIS CASE RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN RESOLVED BY THIS COURT.

A.

May State Court Litigation be the Basis for Applying Collateral Estoppel to a Federal Civil Rights Suit where the Right Infringed is the Right to Petition and Speak to Appropriate Government Officials?

This Court has recently resolved that civil rights suits are not per se immune to the application of principles of res judicata or collateral estoppel. *Allen v. McCurry*, ___ U.S. ___, 101 S. Ct. 411 (1980). This Court explicitly left for later cases to decide what exceptions to issue or fact preclusion were to be hewn out. Id. at ___, 101 S. Ct. at 415 n.7. In this connection, it must be noted that this Court has consistently given speech and petition rights an exalted position, even over other civil rights. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965) (allowing federal injunctive relief in order to avoid the chilling effect proceedings instituted under color of state law would have on first amendment freedoms); Comment, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 U.C.L.A. L.Rev. 177, 211 & n.152 (1979) ("Section 1983 actions involving . . . first amendment rights have drawn the most sympathetic review by the courts."). Yet to be decided, however, is whether the Court's "overriding interest in removing illegal deterrents to the exercise of the right of free speech," *County Court of Ulster v. Allen*, 442 U.S. 140 ( ), includes making an exception to the normal res judicata—collateral estoppel rules. Although the need for such an exception is manifest, especially where the state organ normally looked to for protection of the federal rights is under attack, *see Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 298 n.1 (5th Cir. 1979), this Court has not directly dealt with the issue.

As a result, questions, which but for the application of collateral estoppel here would be rhetorical, become of importance to the citizens not only of New Jersey but also of the entire United States. Can the first and fourteenth amendments withstand allowing punishment for (a) writing letters to appropriate government officials about legitimate concerns; (b) joining with a citizen's group concerned with the protection of the environment in bringing a legitimate law suit; and (c) appearing before a township planning board to oppose the erection of an amusement park? *See, e.g., In re Primus*, 436 U.S. 412, 426 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971) (collective action as well as individual action is protected by the first amendment). *See also Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (financial contributions to a cause does not destroy first amendment protections); *Edwards v. California*, 372 U.S. 229, 235 (1963) (lodging of complaints by letter to various government agencies is protected).

B.

Can there be a "full and fair opportunity" to litigate before a state court where:

1) The state judiciary itself, as opposed to the legislature or executive, is being accused of violating Petitioners' rights to petition and speech;

2) One of Petitioners' attorneys was secretly employed by the Respondent during part of the state court fact finding process; and

3) The state court's decision is totally void of any evidence that it ever recognized Petitioners' repeated claim that their rights to petition and speech were being violated?

Although a state judgment rendered after a full and fair opportunity to litigate may preclude a federal civil rights action, *Allen v. McCurry*, *supra*, this Court has never defined the "full and fair opportunity to litigate" phrase. *Stone v. Powell*, 428 U.S. 465 (1976). This failure to provide a working definition can cause undetermined but nevertheless predictable mischief to important federal civil rights.

The court below dwelled on the fullness of the state court proceedings, *i.e.* 47 days, but failed (possibly for lack of a working definition) to factor in the element of unfairness. It is one thing to have a state court arbitrate a dispute between its citizen and the executive or legislative branch. In such a setting the state court is conspicuously neutral and presumptively capable of affording a fair hearing worthy of reliance and comity. *Younger v. Harris*, 401 U.S. 37 (1971). It is quite another thing where, as here, the alleged free speech impingement springs not from the legislature nor the executive but from the state court itself. Here there was no conspicuous neutrality. Whether a court lacking in this conspicuous neutrality can afford a "fair opportunity" to litigate has not been decided by this Court. (The Fifth Circuit in *Henry v. First National Bank of Clarksdale*, *supra*, at 298 n.1, has, contrary to the Third Circuit in the instant case, reasoned in dicta that preclusion should not apply in such a situation.)

Even assuming *arguendo* that a state has made available a conspicuously impartial forum, can any hearing provided be considered fair for purposes of collateral estoppel where, as is the case here, the complaining litigants attorney was also in the employ of the opposition![6] To infect the fact finding process with a conflict of interest is clearly unethical, ABA Canons of Professional Ethics No. 5, but whether this conduct not raised in the state courts destroys the "full and fair opportunity" made available by the state so as to defeat principles of res judicata was not answered by this Court. *See Allen v. McCurry, supra*, at ____, 101 S. Ct. at 416 n.10.

Lastly, the question of whether there can be a preemptive finding of a full and fair opportunity to litigate a first amendment right where the state court decision, as here, provides no intrinsic evidence that the local courts were cognizant of the Petitioners' repeated argument that their right to petition the legislature or executive was being fettered with a multi-million dollar assessment is also unanswered. Although a decision without articulation has been held to serve as res judicata, *Winters v. Lavine*, 574 F.2d 45, 68 (2d Cir. 1978), there is a serious question as to whether a decision inarticulate to the point of vagueness should bar a litigant from having a federal court pass on his constitutionally guaranteed right to petition his government. *Cf. Bickham v. Lashof*, 620 F.2d 1230 (7th Cir. 1980). What is adequate in theory is inadequate in practice where there is no reasoned rejection of petitioners' specific first amendment contentions. *Allen v. McCurry*, *supra*, at ____, 101 S. Ct. at 418.

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[6] The Restatement (Second) of Judgments, § 68.1 (T.D. No.3, April 15, 1976) lists as an exception to the general rule of issue preclusion:

> "(e) There is a clear and convincing need for a new determination of the issue [where] . . . (iii) because of the conduct of his adversary or other special circumstances, [a party] did not have an adequate opportunity . . . to obtain a full and fair adjudication in the initial action."

The New Jersey courts accept this as a correct statement of the law. *See State v. Gonzalez*, 75 N.J. 181, 380 A.2d 1128, 1132 & n.5 (1977) (by implication).

The New York courts have also articulated guidelines. *Schwartz v. Public Administrator*, 24 N.Y. 2d 65, 72 (1969). Among those guidelines is listed "competency of counsel." *Id.*

CONCLUSION

The chief underpin of our representative form of government is the unfettered right to peaceably petition and speak out to those that make and execute our laws at all levels of government. Impingement on that right by a local court must be scrutinized with the same care as though the impingement were by a local executive or legislature.

The application of the preemptive principles of res judicata and collateral estoppel to speech and petition cases by federal courts must be with measured caution to ensure that the local court was conspicuously neutral and rendered a reasoned rejection of the federal plaintiff's civil rights contentions, and that the Plaintiff had available to him counsel unencumbered by secret conflicts of interest.

To leave the "full and fair opportunity" to litigate test without guidelines is to encourage its cavalier misapplication under pressure of judicial economy and cause intolerable civil liberty errosion. The importance of establishing such guidelines cannot be measured quantitatively because of the recency of this Court's *Allen v. McCurry* decision, but the need for such standards, particularly in speech cases where local political feelings run high, is great and transcends even the recognizable need for doing justice in the instant case.

Respectfully submitted,

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By THEODORE M. KOSTOS
By JOSEPH H. REITER

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2174

RICHARD SWITLIK and STANLEY SWITLIK,
Appellants

v.

HARDWICKE COMPANY, INC.; SIX FLAGS; GREAT ADVENTURE, INC.; JANE DOE and RICHARD DOE; ARTHUR F. BROWN,
Ocean County Sheriff,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 80-01344

Argued February 25, 1981

Before: ADAMS, ROSENN, and HUNTER, *Circuit Judges*

(Opinion Filed June 8, 1981)

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

Stanley and Richard Switlik appeal from the dismissal of their civil rights action filed in the United States District Court for the District of New Jersey pursuant to 42 U.S.C. §1983 (1976).[1] The action sought to enjoin the enforcement of a New Jersey state court judgment against the appellants because execution of the judgment would allegedly punish constitutionally protected first amendment activity. The district court dismissed the case, holding that the Switliks' 1983 claim was barred by the doctrines of res judicata and collateral estoppel, the underlying first amendment issues having been raised and decided in the previous state court litigation. We affirm.

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[1] Our appellate jurisdiction is invoked pursuant to 28 U.S.C. §1291 (1976). Besides the 1983 action, which constituted Count I of

I.

In May 1972 Stanley and Wanda Switlik contracted to sell to Hardwicke Companies, Inc.,[2] a large tract of land on which was to be built a wild animal theme park and "related facilities." When it became clear that the "related facilities" were likely to overwhelm the "wildlife preserve" nature of the park, Stanley Switlik became concerned. At this point, Richard Switlik, Stanley and Wanda's son, became involved in the land sale transaction. Richard began insisting on various additions and alterations to the transaction before the deal was to close. Great Adventure finally sued for specific performance of the contract but, due to the projected delay and expense of the litigation, settled the suit on unfavorable terms in order to close the deal on June 22, 1973.

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the complaint, plaintiffs asserted a second count for unlawful interference with contract. Jurisdiction was alleged to be based on diversity of citizenship, 28 U.S.C. §1332, but the complaint itself evidenced the absence of complete diversity. Plaintiffs alleged the existence of pendent jurisdiction, but did not present a supporting rationale. Although appeal is taken from the district court order dismissing plaintiffs' complaint *in toto*, no mention is made of the second count. We therefore do not address it.

[2] Prior to 1977, Great Adventure, Inc., and Hardwicke's New Jersey preserves, Inc., were subsidiaries of defendant Hardwicke Companies, Inc. During the course of the state court litigation the two subsidiaries were merged into a new corporation called Great Adventure. Great Adventure is now owned by defendant Six Flags, Inc.

On the same day the sale to Great Adventure closed, Richard Switlik purchased a tract of land adjoining the land conveyed by his parents. He placed the land in trust for his four children (the Seelig trust). In September 1973, it was discovered that the access roads to the trust property had been chained off by Great Adventure. The trust brought suit to protect access and settlement was reached when Great Adventure bought the trust property.

During the course of the Stanley Switlik and Great Adventure negotiations, it was assumed that a wedge-shaped parcel of property, designated as "10-C," which jutted into the property subject to transfer was owned by the State of New Jersey by virtue of a deed of gift from Stanley Switlik in 1964. The negotiations proceeded under assurances from Stanley that the state would be willing to trade parcel 10-C for another portion of the property being transferred. However, in July 1973, after the transfer from Stanley to Great Adventure was completed, Richard Switlik, by an unusual move, obtained an amendment to the deed, thereby returning title to parcel 10-C to Stanley Switlik. This posed an insurmountable obstacle to Great Adventure's plans and construction of the major portion of the park had to be delayed pending resolution of the parcel 10-C problem.

In September 1973 Stanley Switlik filed suit in the Superior Court of New Jersey, Chancery Division, to enjoin Great Adventure's cutting of trees on Stanley's property and for damages for trees already removed. A preliminary injunction was denied, but this decision was reversed on appeal. Great Adventure answered and asserted six counterclaims, naming Richard Switlik as an additional defendant. The claims relating to the alleged trespass were severed and tried. The trial court reached the following conclusions: (1) the parties had never reached agreement on the boundaries of the parcel that had been conveyed; (2) the Switliks had "deliberately misled" the buyers concerning the ownership of parcel 10-C; and (3) the Switliks were not entitled to the use of the existing public access road, which bisected the park, as a means of egress and ingress to their property. The trial court set boundaries in accordance with what it perceived to be the parties' intent and imposed a constructive trust on parcel 10-C for the benefit of Great Adventure.

The remaining issues raised by Great Adventure's counterclaims were resolved in separate trials on liability and damages. The findings were that Stanley and Richard had committed fraud with respect to parcel 10-C, that Richard had unlawfully interfered with the relationship created by the contract of sale between his parents and Great Adventure, and that Richard had unlawfully interfered with the prospective economic advantage of Great Adventure. Damages were assessed at $4,912,043 for the fraud count; $1,318,571 for the interference with contract claim; and $117,053 for the interference with prospective economic advantage. The judgment was appealed to the Appellate Division of the New Jersey Superior Court and it affirmed per curiam. The New Jersey Supreme Court denied review and reconsideration. The United States Supreme Court denied a petition for a writ of certiorari. The federal action was filed ten days later.

The Switliks claim in the federal court that the state courts penalized Richard's constitutionally protected activities. The state trial court allowed Great Adventure to introduce into evidence certain letters written by Richard to various governmental agencies complaining about alleged violations of the law being committed by Great Adventure. The bulk of these complaints were of an environmental nature, usually making reference to the harm being done to the adjoining Switlik lands or lakes. Testimony was also elicited from Richard, on cross-examination, of his involvement in efforts to have the access road bisecting the park declared to be the public means of access to the Switlik property by the Jackson Township Planning Board. Further, evidence was received that Richard contributed $6,000 to the Upper Freehold Environmental Commission to defray the cost of an environmental suit brought by that group against Great Adventure. Although it appears that the Switliks' attorney interposed objections, or at least questioned the relevance of such evidence when it was offered, the trial judge admitted it, although he, too, at times had reservations concerning its relevance. Great Adventure's response to the objections and questions was that it demonstrated the malicious intent of Richard Switlik to ruin the Great Adventure project.

The state court apparently accepted Great Adventure's theory. In its opinion on liability the court stated:

> [Richard Switlik] made numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities both before and after the title to the property was conveyed. He persisted in claiming that his father had access through the original access road even after the settlement of this claim. He purchased the "Seelig Property" for at least the partial purpose of being in a position, as a neighbor, to make complaints through an alleged trustee. The complaints reinforced his own complaints against Hardwicke. He did not disclose his interest in this property. He participated in the financing of a law suit by the Environmental Commission of Upper Freehold, et al, by furnishing at least some of his money to the plaintiffs for legal expenses. He caused twenty (20) tons of sand to be dumped in a drainage area to the disadvantage of Hardwicke. He appeared before the Planning Board

> and spoke out in opposition to the location of an Entertainment Part on the Hardwicke property although he had participated in the settlement leading to the title closing. He knew that this settlement specifically contemplated such a park. The above activites interfered with and were detrimental to Hardwicke's economic position.
>
> I conclude that many of the above activities taken separately would not be wrongful. Taken together they satisfy me of Richard Switlik's malicious motivations in undertaking them. I find therefore that Richard Switlik is liable to Hardwicke on [the theory of interference with prospective economic advantage.]

In awarding damages to Great Adventure, the state court expressly allowed recovery of the company's legal fees in defending against the Seelig trust suit and the Environmental Commission suit.

In their federal action, plaintiffs complained that the state trial court had predicated its findings of malice, an essential element in all of defendants' state causes of action, at least in part on evidence of Richard Switlik's complaints to governmental authorities about recurring violations of the law by Great Adventure. These activities, plaintiffs allege, are protected under the first amendment's Petition Clause and their exercise may not serve as the basis of liability under state tort law. The district court found that the constitutional issues had been raised and litigated in the state court. Therefore, the court concluded that the plaintiffs' civil rights claim was barred by principles of res judicata and collateral estoppel.[3] We review the correctness of that judgment.

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[3] For reasons of policy and considerations of judicial economy, we find it inappropriate to reach the complex constitutional question, addressed by the concurrence, of whether the entry and

II.

Our analysis begins with an issue largely ignored by the parties to this appeal: the nature of the judgment presented to us for review. The judgment was entered in response to the defendants' Motion to Dismiss Plaintiffs' Complaint. However, the defendants had submitted two affidavits in support of their motion. One, executed by Carl Hollander, related facts relevant to the issue of the court's personal jurisdiction over one of the defendants. The other affidavit, executed by Frederic K. Becker, attorney for the defendants, detailed the history, in and out of court, of the dispute between these parties. This affidavit was offered in support of the defendants' assertion in their motion that the claims represented by the federal civil rights action were barred by the doctrines of res judicata and collateral estoppel.

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enforcement of the state court judgment constituted "state action" for purposes of a *collateral* attack in the federal district court. First, we believe that the interests of an appellate system of jurisprudence are well served when reviewing courts, if possible, dispose of cases on grounds correctly decided by the trial court. Second, to the extent that the presence of "state action" is a jurisdictional requirement, we find this case to be an appropriate one for assuming jurisdiction *arguendo*. *See* Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. Pa. L. Rev. 712, 725-32 (1979). The issue of state action is highly complex and its resolution poses a rather high risk of committing constitutional error. Because we conclude, for reasons discussed *infra*, that the district court's judgment should be affirmed under well-settled principles of res judicata and collateral estoppel, assuming without deciding that we have jurisdiction permits a proper and lawful resolution of the dispute without facing the dangers lurking in the murky waters surrounding the state action question. Thus, "there is no need to decide the theoretical question of jurisdiction in this case. In the past, [the courts] similarly have reserved difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits of favor of the same party [raising the jurisdictional issue]." Norton v. Matthews, 427 U.S. 524, 532 (1975). *See also* Secretary of the Navy v. Avrech, 418 U.S. 676, 678 (1974).

Federal Rule of Civil Procedure 12(b) provides in relevant part:

> If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The district court did not exclude Becker's affidavit in ruling on the defendants' motion to dismiss. While the motion was pending, the court issued an oral opinion on the plaintiff's request for a preliminary injunction against execution on the state judgment. *Switlik v. Hardwicke Co.*, Civ. 80-1344 (D.N.J. June 4, 1980) (transcript of oral opinion denying request for preliminary injunction). The district court denied the request because the "plaintiffs [had] not demonstrated a likelihood of success on the merits." *Id.* at 18. The court concluded that plaintiffs could not prevail because their constitutional claims were "barred by the doctrines of res judicata and collateral estoppel." *Id.*

The court's conclusion that the claims were barred was based on its examination of "the portion of the record of the State Court proceedings filed in this action. . . ." *Id.* at 21. It is apparent that this included the Becker affidavit. That document, as noted earlier, narrated the history of the dispute that gave rise to the claims then before the district court for resolution. The affidavit contained an unequivocal assertion that "[t]he so-called First Amendment issue was raised by Richard Switlik at every level of the State Court. . . . " Becker Affidavit at ¶28. In support of that assertion, excerpts from briefs submitted by the Switliks to the Appellate

Division of the New Jersey Superior Court, the New Jersey Supreme Court, and the Supreme Court of the United States were attached to the affidavit. Those attachments demonstrate that the very issues presented by this civil rights action were raised and litigated in at least the appellate courts of New Jersey and were presented to the United States Supreme Court in the petition seeking a writ of certiorari. The district court, in denying the application for injunction, referred to and quoted from these appellate brief excerpts, which appear in the record only as attachments to the Becker affidavit. *Switlik v. Hardwicke Co.*, Civ. 80-1344, slip op. at 13, 14-16 (D.N.J. June 4, 1980). The rationale employed in denying the injunction was later expressly relied on by the district court in ruling on the defendants' motion to dismiss. Transcript of Proceedings, Hearing on Defendants' Motion to Dismiss, at 16, *Switlik v. Hardwicke Co.*, Civ. 80-1344 (D.N.J. June 16, 1980). On reading this record on appeal, one can only conclude that the district court converted the Rule 12(b)(6) motion into one for summary judgment and granted it.

One final issue must be resolved before undertaking a substantive review of the district court's grant of summary judgment for the defendants. Rule 12 (b) requires that, if materials outside the pleadings are offered and considered in connection with a converted Rule 12(b)(6) motion, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Although it does not affirmatively appear from the record that the trial judge notified the parties of his intent to treat the motion before him as one for summary judgment, we are satisfied that all parties were given ample time to submit pertinent materials supporting their respective positions. The order dismissing the complaint states that counsel for all parties had indicated that they had no further documents to file. The Notice of Motion indicating the defandants' intent to rely on matters not contained in the complaint was given May 28, 1980, and the court denied the preliminary injunction on June 4.

When the court denied the injunction, it became evident to counsel that if nothing else was presented to support the complaint before the argument on the dismissal motion scheduled for twelve days later, the action would be dismissed for the reasons announced in the bench opinion denying the injunction. Moreover, the Switliks have not claimed in this court prejudice resulting from the conversion of the motion to dismiss into one for summary judgment. Indeed, as alluded to above, neither party has mentioned this procedural aspect of the case, although it significantly affects the burden the plaintiffs must bear on appeal. Absent such an allegation of prejudice and absent plain error, we must regard the district court's action as an entry of summary judgment. *See Sprague v. Fitzpatrick*, 546 F.2d 560, 563 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977). *See also Carter v. Stanton*, 405 U.S. 669, 671 (1972). Therefore, we will restrict our review to determining whether the record before us discloses any genuine issues of material fact and, if not, whether the district court committed any errors of law.

III.

As we observed in part II, the Becker affidavit positively asserted that the constitutional claims on which this federal action is predicated had been raised and litigated at every stage of the state proceedings. The Switliks offered nothing in opposition. Even their complaint, in addition to being legally insufficient to meet the claim contained in Becker's affidavit, *see* Fed. R. Civ. P. 56(e), made no allegation that the constitutional issues had not been considered or resolved in the prior state proceedings. The ineluctable conclusion to be drawn from this record is that there exists no genuine issue of fact material to the question whether this action was barred by res judicata or collateral estoppel. The district court therefore acted correctly in deciding the issue as a matter of law.[4]

IV.

The only remaining issue is whether the district court properly formulated and applied the law to the facts before him. The Switliks concede that the doctrines of res judicata and collateral estoppel have a place in section 1983 litigation. However, relying on *New Jersey Education Association v. Burke*, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978), as the controlling law of this circuit, they argue that the doctrines should preclude only those claims that were "fully and unreservedly" litigated in the state courts. Citing to the Supreme Court's language in *Stone v. Powell*, 428 U.S. 465 (1976), they argue that it must appear that the federal plaintiffs had a "full and fair opportunity" to litigate their claims in the state courts. The Supreme Court has shown a certain willingness to adopt a similar view. In *Allen v. McCurry*, 49 U.S.L.W. 4015 (U.S. December 9, 1980), the Court held that the res judicata doctrine will indeed operate to bar section 1983 plaintiffs who have previously pressed their claims in state courts. The Court, however, seemed predisposed to accept a limited role for the doctrine in a section 1983 action, as it noted that in applying res judicata in other contexts involving federal and state conflicts it "has repeatedly recognized . . . that the doctrine of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate [the] issue in the earlier case." *Id.* at 4017.

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[4] At the hearing on the motion to dismiss, counsel for the Switliks suggested that Judge Debevoise review the entire record of the state proceedings, which spanned 47 days. That suggestion, however, was never accompanied by a proffer of that record. Further, counsel suggested that the district court undertake such a review for the purpose of determining whether there was a sufficient factual basis for the state trial court's finding that the Switliks had maliciously interfered with the defendants' prospective economic advantage. *See* Transcript of Proceedings, Hearing on Defendants' Motion to Dismiss, at 5-6, 12, Switlik v. Hardwicke Co., Civ. 80-1344 (D.N.J. June 16, 1980). The existence of a factual basis supporting the state decision is not relevant to the issue whether the federal claims are barred.

To the extent the Switliks argue that *Burke* demands "federal fact-finding" in this case, *see* 579 F.2d at 773, the argument must fail. In the cited portion of *Burke*, this court was referring to observations made by the Supreme Court in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1969). Those observations must be examined in light of the fact patterns of *Burke* and *England*. Both cases involved federal plaintiffs who, after initiating their federal action, were remitted to state courts by operation of federal abstention doctrines. *Younger v. Harris*, 401 U.S. 37 (1971) (*Burke*); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (*England* and *Burke*). Upon completion of the state proceedings, the *Burke* and *England* plaintiffs returned to federal court and were faced with res judicata defenses premised on the state litigations. The *England* Court's statements concerning the importance of federal fact-finding came in connection with its holding that "in cases where, *but for the application of the abstention doctrine*, the primary fact determination would have been by the district court, a litigant may not be unwillingly deprived of that determination." 375 U.S. at 416 (emphasis added). Thus, it is the invocation of the abstention doctrines, and the accompanying loss of a federal forum by a plaintiff who has deliberately chosen it initially, that triggers the overriding concern for federal fact-finding.

Further, even if there is merit to the Switliks' complaint that the state trial court's treatment of their constitutional claim was inadequate, the claim was freely and forcefully pressed on the state appellate courts. The affirmation of the trial court's judgment by other than a signed opinion is of no consequence. Had the Appellate Division seen the need for further fact-finding, it would have remanded for additional proceedings.

It is important to note that *Allen v. McCurry*, *supra*, referred to a "full and fair *opportunity* to litigate" in the state court. 49 U.S.L.W. at 4017 (emphasis added). Indeed, the Switliks claim that they were denied such an "opportunity." They claim that the trial court repeatedly stated its intention to receive evidence and hear argument on the constitutional claim but failed so to do. However, even in the quoted passages of the state proceedings found in their brief, plaintiffs are consistently unable to point to a statement of the trial judge that, taken in context, bears this out. More damaging is the unanswered assertion of the defendants that, having raised the issue in the course of the trial, the Switliks did not request a hearing on the matter before submitting the case for decision. The conclusion that must be reached, on the basis of the evidence in this record, is that the Switliks asserted their constitutional claim at the state trial level when the questionable evidence was presented. Although the record before us does not indicate how receptive the trial court may have been to their arguments, the record is clear that the plaintiffs vigorously pressed their constitutional claims in the state appellate courts. They now seek to have the same issues heard again in the federal system. This is the precise situation in which the doctrines of res judicata and collateral estoppel operate as a bar, for they not only "reduce unnecessary litigation and foster reliance on adjudication, but also promote comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 49 U.S.L.W. at 4017.

V.

Having concluded that the district court entered an order granting summary judgment, that there existed no genuine issue of material fact, and that the record demonstrates that the plaintiffs had a full and fair opportunity to litigate their constitutional claims in state court, we hold that the district court correctly concluded that the claims presented by this section 1983 action are barred by res judicata and collateral estoppel. We in no way express a view on the merits of the state court's action or on the size of the damages that were assessed against the Switliks.

The judgment of the district court will be affirmed. Each side to bear its own costs.

HUNTER, *Circuit Judge*, concurring:

1. I concur in the result reached by the majority's careful opinion. I write separately because appellants have failed to allege the existence of state action sufficient to establish a federal claim, hence I do not reach the res judicata issue.

2. It is axiomatic that to state a cause of action under section 1983 a complaint must allege both that the defendant was deprived of a right secured by the Constitution or laws of the United States and that the deprivation of this right was "under color of any statute, ordinance, regulation, custom or usage of any state or territory."[1]

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[1] The presence of state action in a section 1983 claim is also essential to federal jurisdiction. Title 28 U.S.C. §1343(3) gives federal courts jurisdiction

Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); *Brenner v. Oswald*, 592 F.2d 174, 178 (3d Cir.), *cert. denied*, 444 U.S. 832 (1979). While the state court's enforcement of an agreement between two private individuals can, in certain instances, constitute state action, *Shelley v. Kramer*, 334 U.S. 1 (1948); *Brenner*, 592 F.2d at 178, the New Jersey court's judgment of fraud and commercial interference between two private parties is not an action under color of state law. As the fifth circuit said in *Hill v. McCellan*, 490 F.2d 859, 860 (5th Cir. 1974) *overruled on other grounds, Sparks v. Duval County Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis v. Sparks*, 101 S. Ct. 183 (1980): "There is no cause of action under the Civil Rights Act if a case is private litigation in which the state does no more than furnish the forum and has no interest in the outcome." *Id. Accord, Dahl v. Akin*, 630 F.2d 277, 280-81 (5th Cir.), *cert. denied*, 49 U.S.L.W. 3780 (Apr. 21, 1981). Quite simply, there is no state action in this case, hence there is no federal claim that can be subject to the doctrine of res judicata.

3. By deciding this case on res judicata grounds, the majority places its imprimatur on a theory of state action

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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

State action is likewise essential if the appellants were to proceed under general federal question jurisdiction, 28 U.S.C. §1331(a) (1976). The under color of state law requirement of section 1983 has consistently been treated as the same thing as the "state action" required under the fourteenth amendment. United States v. Price, 383 U.S. 787, 794 n.7 (1965). *Cf.* Dennis v. Sparks, 101 S.Ct. 183, 197 n.5 (1980) (the state action requirement of 18 U.S.C. §242 (1976) has been interpreted coextensively with the state action requirement of §1983). Hence, under either avenue, state action is a necessary element of federal jurisdiction.

that in my view represents an unwarranted expansion of *Shelley v. Kramer's* enforcement doctrine. The enforcement of a state court judgment that resolves the contractual claims of two private individuals does not constitute state action for section 1983 purposes. *Cf. Dennis v. Sparks*, 101 S.Ct. 183, 186 (1980) ("Merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or joint actor with the judge"). As I stated in *Parks v. Mr. Ford*, 556 F.2d 132, 162 (3rd Cir. 1977), such a theory "would, if expanded to its logical conclusion, completely emasculate the concept of state action" because "[e]very activity permitted under state common law, any activity that has legal consequences, can be transformed into a right enforced by state courts if the parties so chose." *Id.*

4. The federal courts do not sit as an appellate review for all state court adjudications of constitutional rights. *Atlantic Coast Railroad Co. v. Brotherhood of Locomotive Engn'rs*, 398 U.S. 281, 296 (1970); *Lampkin-Ascam v. Supreme Court of Florida*, 601 F.2d 760 (5th Cir.), *cert. denied*, 100 S.Ct. 662, *rehearing denied*, 100 S.Ct. 1071 (1979). Indeed as the Supreme Court reasoned in *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1975): "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and uphold federal law." In this case the Switliks pursued the full procedural protections of the state court followed by a denial of certiorari by the United States Supreme Court. They should not be allowed to initiate a new attack on an adverse state court ruling by claiming that enforcement of the judgment constitutes state action.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RICHARD SWITLIK and STANLEY SWITLIK,

Plaintiffs,

vs.

HARDWICKE COMPANY, INC.; SIX FLAGS; GREAT ADVENTURE, INC.; JANE DOE and RICHARD DOE; ARTHUR F. BROWN, OCEAN COUNTY SHERIFF,

Defendants.

FINAL JUDGMENT DISMISSING COMPLAINT
(Filed July 8, 1980)

This matter having been opened to the Court on June 16, 1980 by Messrs. Wilentz, Goldman & Spitzer (Frederic K. Becker, Esq. appearing), attorneys for defendants, Hardwicke Companies, Incorporated (incorrectly designated in the Complaint as Hardwicke Company, Inc.) ("Hardwicke"), GSC/Six Flags Corporation (incorrectly designated in the Complaint as Six Flags) ("Six Flags"), and Great Adventure, Inc. ("Great Adventure") on the motion of said defendants to dismiss the Complaint; and Messrs. Pellettieri, Rabstein & Altman (Richard M. Altman, Esq. appearing), attorneys for plaintiffs, Richard Switlik and Stanley Switlik appearing in opposition to said motion; and in the presence of Messrs. Babcock & Hennes (Peter S. Hennes, Esq. appearing), attorneys for defendant, Arthur F. Brown, Ocean County Sheriff; and the Court having reviewed the Verified Complaint filed herein, the Notice of Motion to Dismiss Complaint filed on behalf of defendants, Hardwicke, Six Flags and Great Adventure, the memoranda of law filed on behalf of the plaintiffs and on behalf of said defendants, and the affidavits filed on behalf of said defendants; and the Court having heard and considered the oral argument of counsel presented on May 30, 1980 with respect to then pending application of plaintiffs for an interlocutory injunction and the oral argument of counsel presented on June 16, 1980; and the Court having rendered an oral opinion from the bench on June 4, 1980 setting forth its Findings of Fact and Conclusions of Law; and counsel for all parties having indicated that they had no further papers to file; and for good cause shown; it is on this 8th day of July, 1980

FINALLY ADJUDGED AND ORDERED, for the reasons set forth in this Court's oral opinion rendered on June 4, 1980 and based upon the Findings of Fact and Conclusions of Law therein set forth, and further based upon the Court's ruling from the bench on June 16, 1980, that the motion of defendants, Hardwicke, Six Flags and Great Adventure, to dismiss the Complaint herein shall be and the same is hereby granted and the said Complaint shall be, and the same is hereby, dismissed with prejudice in its entirety.

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.D.C.J.

The undersigned do hereby consent to the form only of the within Final Judgment.

Pellettieri, Rabstein & Altman
Attorneys for Plaintiffs

BY: /s/ Richard M. Altman
RICHARD M. ALTMAN
A Member of the Firm

Babcock & Hennes
Attorneys for Defendant,
Arthur F. Brown,
Ocean County Sheriff

BY: /s/ Peter S. Hennes
PETER S. HENNES
A Member of the Firm

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RICHARD SWITLIK and STANLEY SWITLIK,

Plaintiffs,

vs.

HARDWICKE COMPANY, INC.,

Defendant.

ORAL OPINION
(Filed July 30, 1980)

Trenton, New Jersey 9:00 AM
June 4, 1980 ANGELO W. LOCASCIO
Clerk

BEFORE: THE HONORABLE DICKINSON R. DEBEVOISE, United States District Judge

APPEARANCES: PELLETTIERI, RABSTEIN & ALTMAN
BY: RICHARD M. ALTMAN, ESQ. and
NEAL S. SOLOMON
For the Plaintiffs.

WILENTZ, GOLDMAN & SPITZER
BY: FREDERICK K. BECKER, ESQ.
For Hardwicke Company, Inc.

PETER S. HENNES, ESQ.
For Arthur Brown, Sheriff

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be accurate record as taken stenographically in the above entitled proceedings.

/s/Helen C. Johnson
HELEN C. JOHNSON,
Court Reporter

THE COURT: Good morning. I propose to read my opinion into the record. It will constitute the findings of fact and conclusions of law, and I would like to reserve the opportunity to make any grammatical or any corrections not of substance should this opinion have to be printed up or typed up for any purposes.

This is in the matter of *Richard Switlik and Stanley Switlik v. Hardwicke Company, Inc.*, Six Flags Great Adventure, Inc., Jane Doe, Richard Doe and Arthur F. Brown, Ocean County Sheriff.

Plaintiffs, Richard Switlik and Stanley Switlik, instituted this action against the various defendants alleging a claim arising under 42 U.S.C. Section 1983 in Count I of their complaint and a claim for malicious interference with plaintiffs' prospective economic advantage in Count II of their complaint. Jurisdiction is asserted under 28 U.S.C. Sections 1331 and 1343(3) and (4) and under Section 1332(a).

The case arises out of the sale of real estate by Stanley Switlik to defendant, Great Adventure, Inc. and the extensive state court litigation which accompanied and followed that sale.

Prior to 1977, Great Adventure, Inc. and Hardwicke's New Jersey Preserves, Inc. were subsidiaries of defendant Hardwicke Companies, Incorporated which I will refer to as Hardwicke. During the course of the State Court litigation, the two subsidiaries were merged into a new corporation called Great Adventure, Inc. Great Adventure is now owned by defendant, Six Flags. Hardwicke no longer has an ownership interest in Great Adventure. In this opinion when there is no need to distinguish between them, I shall refer to the various Hardwicke companies as Great Adventure.

Defendants Hardwicke, Great Adventure and Six Flags were joined because of their interest or possible interest in the judgment in the State Court actions entered against the Switliks. Defendant Arthur S. Brown, Ocean County Sheriff, was joined because, unless restrained, he will in all likelihood play a role in enforcing that judgment.

Plaintiffs' application for a temporary restraining order having been denied, an order was entered requiring defendants to show cause why an interlocutory injunction restraining the defendants from proceeding to sale, or taking any other actions based upon the Judgment of Record appearing at Docket No. C-371-73 of the Ocean County Court should not be granted pending the final hearing of this action. A hearing was held on May 30, 1980.

The facts: In the spring of 1972, Stanley Switlik and Wanda Switlik, his wife (now deceased) entered into a contract with Great Adventure to convey to Great Adventure approximately "820 acres more or less" of the Switliks' very substantial Jackson Township, New Jersey, real estate holdings. Great Adventure contemplated using the land "primarily for a wild animal theme park and related uses" and the Agreement provided that Great Adventure was obliged to "preserve the ecology aspect of the premises to the best of its ability." Both plaintiffs and other members of their family have long had a strong interest in environmental concerns and have given land and money to further these interests.

After the signing of the contract, difficulties developed in its implementation. Great Adventure instituted a suit for specific performance which ultimately was settled, and a closing of title was effected on June 23, 1973.

In August of 1973, Richard and Stanley Switlik became aware of the specifics of Great Adventure's plans for the use of the land and were very much opposed to such use, in particular to the construction of an amusement park. Richard Switlik thereupon commenced a campaign in opposition to the various aspects of the project, including writing numerous letters to the New Jersey Department of Environmental Protection and other public officials and appearing at public hearings before various official bodies.

On September 28, 1973, Stanley Switlik instituted suit in the Superior Court of New Jersey against Great Adventure seeking injunctive relief and many damages for the destruction of trees in a 24-acre parcel owned by him.

Great Adventure counterclaimed, seeking, among other things, to impose a constructive trust upon a disputed triangular parcel of land known as Parcel 10C and to resolve various other title questions. Great Adventure also counterclaimed seeking compensatory and punitive damages against Stanley and Richard Switlik for fraud and against Richard Switlik alone for malicious interference with contractual relations and malicious interference with prospective economic advantage.

Prior to the first trial in this action, the results of which include the finding of Stanley Switlik fraud, the

Trial Court determined to try initially the issues relating to title, leaving the damage claims of both sides for future trial. After a lengthy trial, the Honorable Mark Addison found, among other findings, that Stanley Switlik had defrauded Great Adventure regarding the ownership of Lot 10C and imposed a constructive trust requiring its conveyance by Stanley Switlik to Great Adventure. That decision was unanimously affirmed by the Appellate Division of the Superior Court on February 2, 1976, and further review either to the Supreme Court of New Jersey or to the Supreme Court of the United States was not sought.

Trial of the remaining issues, that is to say Richard Switlik's liability for fraud, malicious interference with contract, and malicious interference with prospective economic advantage and the quantum of damages to be assessed against both Switliks had been bifurcated. The remaining questions of liability were tried before Judge Doherty in June of 1976.

After the second trial, consisting of 13 trial days, Judge Doherty found that Richard Switlik was also liable for the Lot 10C fraud, and was liable as well for his malicious interference with Great Adventure's contractual rights and for his malicious interference with Great Adventure's economic expectancy.

During the course of the trial before Judge Doherty, Great Adventure's attorneys, over the Switliks' objection questioned Richard Switlik about the letter he had written in 1973 and 1974 to various government officials and offered evidence of Richard Switlik's conference with Jackson Township public officials and bodies. It was Great Adventure's contention that the truth of what Richard Switlik wrote and said was immaterial and that the fact of what he did bore upon the question of his motive generally a matter which it asserts was relevant to the question of malicious interference with contractual relations and malicious interference with prospective economic advantage. Judge Doherty admitted the evidence but at the time refrained from making a ruling on the propriety of Richard Switlik's conduct in this regard or on the purpose for which the evidence was received. No ruling in this regard was made during the course of the trial, but the portion of Judge Doherty's opinion relating to malicious interference with prospective economic advantage referred to these activities.

Judge Doherty's July 14, 1976 opinion dealt with the three elements of Great Adventure's counterclaim which had not been resolved by the first trial before Judge Addison.

As to the fraud charges against Richard Switlik, Judge Doherty wrote:

"Judge Addison found plaintiffs guilty of fraud and Richard Switlik contends that it is not clear which of the plaintiffs were included in this finding. I find that Richard Switlik knew that Parcel 10C belonged to his father at the time the contract was being negotiated. He attempted to get the boundary line in question moved to connect with Parcel 10C. He joined with his father in misrepresenting the ownership of this parcel to be in the State of New Jersey. This was to the disadvantage of Hardwicke and prospectively to his advantage.

"I conclude that Richard Switlik precipitated a fraud against Hardwicke and is liable therefor. Stanley Switlik has been found to be so liable by Judge Addison and I conclude from my own evaluation of the testimony that he is liable."

As to the charge that Richard Switlik interferred maliciously with Great Adventure's contractual relations, Judge Doherty wrote:

"Richard Switlik advised Hardwicke that title would not close in accordance with the contract unless a certain boundary line was relocated. At this time he believed there was no ambiguity in the contract as to the location of this line between the property conveyed and that reserved by his parents. He did not consult with his parents prior to this action.

"I find that he prevailed upon and encouraged Scott Bailey, an officer of the Girl Scout Council who owned land adjoining the premises in question, to oppose a necessary zoning variance before the Jackson Township Board of Adjustment. His purpose was to assure objection and yet not do so openly, since his father was bound by the contract in question to cooperate in obtaining the variance.

"Richard Switlik further insisted that title would not close unless Parcel B of the premises to be conveyed contained a restriction against permitting wild animals thereon. There was no such restriction in the contract.

"He further insisted on a specific location for an access road at or near the existing access road although the location of this road was to be negotiated. The clear intention of the parties was to locate the road at a place other than the existing access road. This road was clearly delineated on the map attached to the contract and its location would not ordinarily have to be negotiated.

"He further insisted that the conveyance omit the neck of Switlik Lake although its conveyance was contemplated by the parties. This is evidenced by the addition of $100,000 to the contract price before the contract was signed. Judge Addison found, at the earlier trial of a different aspect of this case, that there was no common understanding with respect to the location of the boundary line.

"Richard Switlik's above referred to understanding that there was no ambiguity remains important in determining his frame of mind in insisting on the changes in the contract. I find that these demands resulted in many concessions by Hardwicke in order to accomplish the settlement of the specific performance action. This settlement was forced upon Hardwicke by the elements of economic duress outlined in the testimony by Hardwicke officers.

"I conclude that the above activities of Richard Switlik interferred with the Hardwicke contract and were wrongful, without justification; and amounted to legal malice. These acts were intentional detrimental to Hardwicke and potentially beneficial to Richard Switlik, the only son of the vendors. Under this theory Richard Switlik is liable to Hardwicke."

As to the charge that Richard Switlik interferred maliciously with Great Adventure's prospective economic advantage, Judge Doherty wrote:

"Richard Switlik participated in a fraud against Hardwicke as will be referred to hereinafter. He made numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities both before and after the title to the property conveyed. He persisted in claiming that his father had access to the original access road even after the settlement of this claim. He purchased the 'Seelig Property' for at least the partial purpose of being in a position, as a neighbor to make complaints through an alleged trustee. The complaints reinforced his own complaints against Hardwicke. He did not disclose his interest in this property. He participated in the financing of a lawsuit by the Environmental Commission of Upper Freehold et al., by furnishing at least some of his money to the plaintiffs for legal expenses. He caused twenty (20) tons of sand to be dumped in a drainage area to the disadvantage of Hardwicke. He appeared before the Planning Board and spoke out in opposition to the location of an Entertainment Park on the Hardwicke property although he had participated in the settlement leading to the title closing. He knew that this settlement specifically contemplated such a park. The above activities interferred with and were detrimental to Hardwicke's economic position.

"I conclude that many of the above activities taken separately would not be wrongful. Taken together they satisfy me of Richard Switlik's malicious motivations in undertaking them. I find therefore that Richard Switlik is liable to Hardwicke on this theory."

After the issuance of this opinion, Judge Doherty conducted a trial on the question of damages which took 29 trial days. At the conclusion of that trial in an opinion dated August 26, 1977, Judge Doherty awarded compensatory damages against the Switliks on the three claims against them as follows:

One. Against Stanley Switlik and Richard Switlik for fraud - $4,912,043;

Two. Against Richard Switlik for malicious interference with contractual relations - $1,318,511;

Three. Against Richard Switlik for malicious interference with prospective economic advantage - $117,053.

It is the Switliks' contention that these judgments against them are invalid because they penalize them for the exercise of their constitutional protected rights to petition governmental officials to institute suit and to speak on issues. The Switliks maintain that the State Court violated their rights, both by making this conduct the basis of liable and by using protected conduct as evidence of improper actions on their part.

The Switliks appealed Judge Doherty's judgment to the Appellate Division of the Superior Court of New Jersey, and Great Adventure and Hardwicke cross-appealed from the denial of a substantial portion of their compensatory damage claim and all of their punitive damage claims. The Switliks raised their constitutional claims on the appeal.

After all argument before the Appellate Division on May 1, 1979, the findings of Judge Doherty were unanimously affirmed by the Appellate Division by decision dated May 31, 1979. The cross-appeal of Great Adventure as to rejected damage claims was denied at the same time. In rendering its decision the Appellate Division stated that:

"The judgments of the Trial Court is (sic.) based on findings of fact which are adequately supported by the evidence; the determination of the Trial Court on the motion for a new trial does not constitute a manifest denial of justice, and that all issues of law raised are clearly without merit. Rule 2:11-3(e)(1)(A) (C) and (E)."

Plaintiffs then petitioned the Supreme Court of New Jersey for certification to review that Appellate decision determination, which petition was denied on October 4, 1979. When their petition was denied, the Switliks moved for reconsideration of the denial of certification which motion was also fully briefed in the Supreme Court. The motion for reconsideration was denied on December 20, 1979.

The Switliks next petitioned for writ of certiorari to the Supreme Court of the United States essentially on the grounds raised in Count I of the present action. Pending an application by the Switliks to the United States Supreme Court for a stay against enforcement of the judgment pending their petition for certiorari, such a stay was granted by the Supreme Court of New Jersey.

Thereafter, the United States Supreme Court denied such a stay and the earlier stay of the New Jersey Supreme Court was dissolved by its terms. On April 28, 1980, the Supreme Court of the United States denied plaintiffs' petition for certiorari. On May 8, 1980 the present action was filed in this court.

In a reply brief filed in the United States Supreme Court, the Switliks describe the manner in which their constitutional issues were raised in their New Jersey Supreme Court proceedings.

"With regard to respondent's assertion that the First Amendment issue was not raised in either the petition for certification to the Supreme Court of New Jersey or the motion for reconsideration of the denial thereof, the following should be noted. Rule 2:12-7(a) of the New Jersey Rules of Court provides, inter alia, that a petition for certification ". . . shall be in the form of a brief . . . not exceeding 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of table of contents, citations and appendix. . . . " In view of the page limitation regarding petitions for certification to the New Jersey Supreme Court, it is clear that the petition itself cannot explicitly put before the Court all the issues raised below, particularly in cases such as the one herein where countless issues have been raised in the Appellate Division. In order to alleviate this difficulty, Rule 2:12-7(b) provides that, within ten days after filing the Notice of Petition for Certification, nine copies of petitioner Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court. Thus, once petitioners file the required copies of their Appellate Division brief with the New Jersey Supreme Court, the First Amendment issue raised herein was squarely before it.

Based on these facts, the Switliks asked the Court to grant a preliminary injunction restraining defendants from acting upon the judgment against them.

The Law: First as to the contentions of the parties, plaintiffs contend that Judge Doherty created an unconstitutional tort by predicating a finding of malicious interference with prospective business advantage upon the exercise by a defendant of his constitutional rights, namely writing to public officials, attending and stating positions at meeting of public bodies and assisting in the financing of an environmental suit, and in the purchase of property access to which later became the subject of a lawsuit.

Plaintiffs go even further: They contend that the fact of a person's exercise of constitutional rights such as these cannot even be used as evidence that some other conduct, which is not itself constitutionally protected, constitutes malicious interference with prospective economic advantage. Thus in the present case, plaintiffs argue that evidence of their exercise of constitutionally protected rights should not have been used to show that their other conduct such as making false claims to title or dumping sand was malicious.

It is plaintiffs' contention that these issues were not adequately dealt with by the State Courts.

Defendants, on the other hand, contend that notwithstanding certain ambiguities in Judge Doherty's opinion finding liability, he did not find Richard Switlik's protected conduct to constitute a tort; he simply referred to it as evidence of Richard Switlik's improper motivation, which he was constitutionally entitled to do.

Further, defendants assert that of the three torts which plaintiff was found to have committed, only one involved plaintiffs' protected activities, namely the tort of interference with prospective economic advantage, for which only $117,000 in damages was awarded. The other two torts for which damages in the amounts of 4,912,043 and 1,318,511 were awarded, did not involve the protected activity. Further, Stanley Switlik against whom a judgment for fraud in the amount of $4,912,043 was entered, had not engaged in any protected activities, and the finding of fraud against him could not have been based in any way on such activities by his son Richard.

Defendants further contend that the action should be dismissed because, first, the State Court proceedings have been concluded with full procedural due process and its judgment is therefore conclusive, and, second, plaintiffs are barred by the doctrines of res judicata and collateral estoppel.

Second, the applicable standards for issuance of preliminary injunction:

One seeking preliminary injunctive relief must demonstrate the likelihood of success of the merits, immediate and irreparable harm, the improbability of harm to third parties and the effect of injunctive relief on the public interests. *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979).

I have concluded that in the present case preliminary injunctive relief should be denied for the reason that plaintiffs have not demonstrated a likelihood of success on the merits. The constitutional claims which plaintiffs advance are not applicable to the major portion of the judgment from which they seek relief. In any event, they are barred by the doctrines of res judicata and collateral estoppel.

Third, the judgment complained of: That portion of Judge Doherty's opinion which finds that Richard Switlik had maliciously interferred with Great Adventure's prospects of economic advantage raises troubling questions. It is not at all clear that the instances of constitutionally protected behavior to which he referred were taken merely as evidence of an improper motive when Richard Switlik engaged in other conduct not protected by The Constitution. The opinion could be read as holding that Richard Switlik is liable for engaging in activities which are constitutionally protected.

However, defendants correctly note that this defect, if it be a defect, relates only to one of the torts involved, which resulted in damages of only $117,000.

Stanley Switlik was found to have committed a fraud by another judge after a trial in which no evidence of protected activities was introduced. That tort resulted in the judgment of $4,912,043 against Stanley Switlik.

Richard Switlik was found to have joined in the fraud, and he was found to have maliciously interferred with Great Adventure's contract rights by Judge Doherty. However, he did not base his findings on evidence of protected activities. Plaintiffs assert that there was one fact upon which liability for contract interference was based which was protected namely: "Richard Switlik prevailed upon and encouraged Scott Bailey, an officer of the Girl Scout Council which owned land adjoining the premises in question, to oppose a necessary zoning variance before the Jackson Township Board of Adjustment." However, under the circumstances described by the Court, I do not believe that that conduct can be said to have been constitutionally protected from being used as evidence of the tort involved. "His purpose was to assure objection and yet not to do so openly, since his father was bound by the contract in question to cooperate in obtaining the variance."

Thus, the alleged unconstitutional basis of Judge Doherty's opinion did not result in the judgment for $4,912,043 against Stanley Switlik or the judgment for $4,912,043 and $1,318,511 against Richard Switlik.

Under the principles of *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), execution upon the judgment to that extent should not be enjoined. Since the record shows that the Switliks do not have sufficient assets to pay those two portions of the judgment, enjoining collection of $117,000 would be a futile gesture.

Fourth, res judicata and collateral estoppel: It is my conclusion based upon the portion of the record of the State Court proceedings filed in this action that plaintiffs raised their constitutional objection in the Appellate Division of the New Jersey Supreme Court and in the New Jersey Supreme Court. The issues were considered and decided against them, and the United States Supreme Court refused to grant certiorari.

Under the principles of res judicata and collateral estoppel, these claims cannot be relitigated in this court. *Roy v. Jones*, 484 F.2d 96 (3d Cir. 1973); *Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir. 1974), *cert. denied* 419 U.S. 1093 (1974).

Res judicata, sometimes referred to claim preclusion bars a party from relitigating at least those claims which have been previously litigated and finally determined. *City of Hackensack v. Winner*, 162 N.J. Super (App.Div. 1978).

Collateral estoppel, sometimes referred to as issue preclusion, applies where a party seeks to relitigate issues or facts which have already been raised and litigated in a prior proceeding, usually on a different claim between the same parties. *City of Hackensack v. Winner*, supra, at pages 27-28. Thus, where a particular issue was raised and litigated in the prior proceeding, the unsuccessful party to that proceeding may not assert the same issue in a subsequent action.

In this case, both res judicata and collateral estoppel apply because the "protected activity" claim presented here was both raised and litigated as part of Great Adventure's claim against Richard Switlik in the State Courts. Under either doctrine, the matters raised in this case are clearly barred under the law of New Jersey.

Federal Courts must give full faith and credit to state judicial proceedings. 28 U.S.C. Section 1738. This means a Federal Court must accord a state judgment the same res judicata and collateral estoppel effect the judgment would have in the state which rendered it. *Gostin v. Nelson*, 213 F.Supp. 164, 170 (D. Del. 1962). This principle applies to decisions involving federal constitutional issues as well as question of state law. *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978); *Mitchell v. NBC*, 553 F.2d 265 (2d Cir. 1977); *American Mannex Corp. v. Rozands*, 462 F.2d 688 (5th Cir.) *cert. denied*, 409 U.S. 1040 (1972).

The principles of both res judicata and collateral estoppel are fully applicable to a Section 1983 claim. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Bennun v. Board of Governors of Rutgers, State University of New Jersey*, 413 F.Supp. 1274 (D.N.J. 1976).

Having concluded that plaintiffs are barred by the doctrines of res judicata and collateral estoppel and therefore have not demonstrated a likelihood of success on the merits, it is unnecessary to consider defendants' contention that a decision of a State Court on the merits in an action which was conducted in all respects in accordance with procedural due process is not state action under Section 1983 and cannot be collaterally attacked in a Section 1983 proceeding. See *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948) *cert. denied*, 336 U.S. 944 (1949).

On the basis of the foregoing, plaintiffs' application for a preliminary injunction will be denied. Defendants will be requested to submit an appropriate order.

Defendants have moved to dismiss the complaint. My present thinking is that the reasons which led me to deny the application for a preliminary injunction require dismissal of Count I of the complaint and that the absence of either pendent or diversity jurisdiction would require dismissal of Count II of the complaint.

However, this motion has not been argued specifically, and I will hear argument on it on June 16, on the June 16 motion day should any party have more to say on the subject.

Gentlemen, that is the opinion.

MR. BECKER: Thank you very much.

THE COURT: Would you submit an order?

MR. BECKER: Yes, your Honor.

THE COURT: Any mechanical arrangements that have to be worked out?

MR. BECKER: I will submit it first to Mr. Altman. He may want to take an appeal.

MR. ALTMAN: We will consider it with our client.

I am going to discuss with my clients the question of any necessity in light of your opinion to return on the 16th. I have not discussed that with them, but I will communicate with the Court and Mr. Becker in that regard.

THE COURT: I would think the logic of this would apply to that, but there may be something which is still open.

MR. ALTMAN: What is open now escapes me, but I would like to have time to digest it.

THE COURT: It was very well briefed and a thoroughly presented case. I think everything was there in a very simple, concise manner.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RICHARD SWITLIK and STANLEY SWITLIK,

Plaintiffs,

vs.

HARDWICKE COMPANY, INC.;
SIX FLAGS; GREAT ADVENTURE, INC.;
JANE DOE and RICHARD ROE; ARTHUR
F. BROWN, Ocean County Sheriff,

Defendants.

VERIFIED COMPLAINT AND JURY DEMAND
CIVIL ACTION NO. 80-1344
(Filed May 8, 1980)

I. NATURE OF THE ACTION

1. This is a civil rights action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983; and an action for damages for tortious interference with prospective economic advantage. Plaintiffs seek to redress the deprivation under color of state law by the defendants of rights secured to the plaintiffs by the First and Fourteenth Amendments to the U.S. Constitution and Article IV, Section 2, Clause 1 of the U.S. Constitution. Plaintiffs seek to enjoin the enforcement of a State court judgment entered against plaintiffs in violation of their constitutional rights as described more fully below.

II. JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 1343(3) and (4). There exists between

the parties an actual controversy, justiciable in character, involving a sum in excess of ten million dollars ($10,000.000.00),

2. Jurisdiction is further invoked pursuant to 28 U.S.C. § 1332(a) in that the matter in controversy exceeds the sum of ten thousand dollars ($10,000.00) and the parties to this litigation are citizens of different states, and in addition thereto theories of pendant jurisdiction of state claims.

III. PARTIES

3. Plaintiff Stanley Switlik is a citizen of the United States who resides in Marathon, Florida at all times hereto.

4. Plaintiff Richard Switlik is a citizen of the United States who resides in Allentown, New Jersey at all times hereto.

5. Defendant Hardwicke Company, Inc. (hereinafter referred to as Hardwicke) is a corporation organized under the laws of the State of Delaware and which does business in the State of New Jersey.

6. Defendant Great Adventure, Inc., is a corporation organized under the laws of New Jersey and was formed by merger of two subsidiaries owned by defendant Hardwicke, knonw as New Jersey Preserves and Great Adventure, Inc.

7. Defendant Great Adventure, Inc. is a division of defendant Six Flags, a corporation formed under the laws of Delaware and doing business in the State of New Jersey at all relevant times hereto.

8. Defendants Jane Doe and Richard Roe are other persons or corporations as yet unknown who may own a part of the judgment against the Switliks.

9. Defendant Arthur F. Brown is the Sheriff of Ocean County and charged with the duty of executing on judgments of record entered upon the docket of the Superior Court of New Jersey of Ocean County.

IV. STATEMENT OF FACTS

10. In early 1972, defendant Hardwicke Co., Inc. became aware that certain portions of an estate owned by Stanley Switlik and his wife, Wanda Switlik (now deceased), in Jackson Township, New Jersey might be available for purchase.

11. Defendant Hardwicke was at all times hereto engaged in, among other things, the development and operation of wild animal safari parks and was interested in purchasing property in New Jersey for the purpose of constructing a wild animal safari park.

12. Following a series of meetings in or about the spring of 1972, Stanley and Wanda Switlik entered into a contract with defendant Hardwicke to convey approximately "820 acres more of less" of their estate for a total sum of $2,150,000.00, although the Switliks dispute the authenticity of Wanda's signature on the document.

13. The Agreement provided that the land was to be used "primarily for a wild animal theme park and related uses," and further provided that defendant Hardwicke was obliged to "preserve the ecology aspect of the premises to the best of its ability."

14. Plaintiffs Richard and Stanley Switlik and other members of the Switlik family have had an abiding interest and conviction in the preservation of the environment and conservationist concerns. The Switlik family has in the past and continues to the present to support local, state and federal interests in the preservation of our environment, dedicating land and money to such causes. (See e.g. Exhibit "A".)

15. The contract of sale referred to in paragraph 12, *supra*, was replete with ambiguities and, in order to clarify the understanding of the parties, protracted negotiations occurred up until June 23, 1973, when the transfer of title was effectuated.

16. The agreement for sale contained numerous ambiguities and the parties' efforts to resolve these ambiguities amicably failed, whereupon defendant Hardwicke instituted suit for specific performance. Said suit was later settled and the closing effectuated on June 22, 1973. At that time defendant Hardwicke executed a release as to any and all claims it might have had against Stanley and Wanda Switlik arising out of these disputes.

17. On August 6, 1973, defendant Hardwicke applied for conceptual approval to the Jackson Township Planning Board for Phase II of its project, an amusement park. Following a hearing on or about August 20, 1973, Hardwicke's application for conceptual approval was denied by the Jackson Township Planning Board.

18. On or about September 24, 1973, following further discussions with the Planning Board, an environmental impact study was requested from Defendant Hardwicke to be submitted to the Board for its review.

19. In August, 1973, plaintiffs Richard and Stanley Switlik first became aware of the intentions of defendant Hardwicke to erect an amusement park on the land transferred under the Agreement for Sale. The Switliks became extremely concerned that the "park", which had been projected by Hardwicke as primarily an animal safari park with some "related" entertainment facilities subordinate thereto, would in fact pollute the environment in every way, and have an adverse impact on the surrounding land.

20. Richard Switlik appeared at the Jackson Township Planning Board meeting in the fall of 1973 as a

concerned citizen and voiced his objections to "Phase II" of the Hardwicke project, i.e., the amusement park. Plaintiffs Switlik were vocal critics of the adverse environmental impact which the amusement park would have on the immediate area, including tracts of land owned by them immediately adjacent to the Hardwicke site.

21. Neither Stanley nor Richard Switlik had any objections to the safari park in principle but voiced their concerns as citizens of the State of New Jersey and landowners in the Township that the defendant Hardwicke ought to be required to comply with all environmental regulations, state, federal and local, as well as those covenants in the deed which forbade pollution and other damage to the land.

22. On September 28, 1973, plaintiff Stanley Switlik instituted suit in the Superior Court of New Jersey against defendants Hardwicke, Great Adventure, Inc., *et. al.*, seeking injunctive relief and money damages related to the destruction of trees on a 24 acre parcel owned by Mr. Switlik. Defendant Hardwicke counterclaimed seeking, *inter alia*, to preclude the Switliks from access to a public thoroughfare and to impose a constructive trust as to a disputed two acre parcel known as "10C". Defendant Hardwicke further counterclaimed for compensatory and punitive damages against Stanley and Richard Switlik for fraud and against Richard Switlik individually for malicious interference with contractual relations and malicious interference with prospective economic advantage.

23. The matter was set down for trial for October 23, 1973, and plaintiff Stanley Switlik moved to amend his pleadings to include a count for reformation of the deed.

24. The counterclaims of defendant Hardwicke referred to paragraph 22, *supra*, were asserted on the day

of trial, October 23, 1973, with Richard Switlik added as an additional defendant on these counterclaims. A motion to sever was made by counsel for Stanley Switlik which was granted in part and denied in part by Judge Addison of the Superior Court of New Jersey, Chancery Division, Ocean County. The issues arising out of the complaint as well as the defense of unclean hands were litigated and the remaining claims and counterclaims adjourned for further discovery.

25. On or about December 20, 1973, following several weeks of trial, the Honorable Mark Addison of the Superior Court of New Jersey, Chancery Division, rendered a decision pursuant to a Letter Memorandum Opinion which found as follows:

a. The parties had in fact never agreed on where the boundary line was to be in the vicinity of the disputed 24 acre parcel, nor what exactly was to be conveyed in the area in question;

b. The Switliks had misled Hardwicke in connection with the claim of ownership of Parcel 10C;

c. The existing access road running northwesterly from Reed Rd. to the Switlik homestead was no longer available to the Switliks for use; and

d. that Richard Switlik was the agent of the vendor, Stanley Switlik.

(A copy of Judge Addison's Opinion is attached hereto as Exhibit "B".)

26. On or about February 2, 1976, the Appellate Division of the Superior Court of New Jersey affirmed the decision of Judge Addison in a *per curiam* opinion for the reasons set forth by the trial court.

27. The remaining claims and counterclaims were set down for trial before the Honorable Robert H. Doherty,

Jr. of the Ocean County Superior Court, and the case was bifurcated on the questions of liability and damages.

28. The liability portion of the trial before Judge Doherty occurred from June 12, 1976, and consisted essentially of the counterclaims asserted by defendant Hardwicke as follows:

a. Damages allegedly resulting from the delay in opening the entertainment park occasioned by a preliminary injunction entered by the Superior Court of New Jersey, Appellate Division on October 2, 1973 pending resolution of Stanley Switlik's claim that defendant Hardwicke was wrongfully destroying certain trees on property owned by Stanley Switlik. (See paragraph 22 *supra*.)

b. A judgment quieting title against Stanley and Wanda Switlik as against claims by the Switliks that (a) title to the disputed 24 acre parcel was not conveyed to respondent Hardwicke, (b) the Switliks retained the right of access to a public road extending south from their homestead, and (c) a piece of land known as parcel 10C was in fact owned by Stanley Switlik at the time of the initial transfer of title.

c. Damages for alleged wrongful failure to transfer title from May, 21, 1973 to June 21, 1973.

d. Damages from Richard Switlik for alleged interference with Hardwicke's contractual rights to acquire the property from Stanley and Wanda Switlik.

e. Damages from Richard Switlik for alleged interference with prospective economic advantage of Hardwicke.

29. Considerable testimony was introduced at trial concerning Richard Switlik's actions in contesting the environmental impact of Hardwicke's garish amusement park in an ecologically sensitive area.

30. The testimony introduced by defendants showed that both Richard and Stanley Switlik appeared at different times before the Jackson Township Planning Board to contest defendant Hardwicke's purported uses and to insure their conformity with all environmental regulations.

31. Throughout the summer and fall of 1973, numerous letters were written by Richard Switlik to various state and local agencies expressing his concern for noise and water pollution as well as his insistence that governmental entities insure compliance with all environmental regulations by defendant Hardwicke. (See letters from Richard Switlik and to Richard Switlik attached hereto and marked as Exhibits "C" and "D".)

32. On September 10, 1973, a Complaint and Order to Show Cause was filed in the Superior Court of New Jersey, Chancery Division of Mercer County in the matter of *Jack L. Seelig v. Hardwicke Corp. et. al.* The action sought injunctive relief and damages for the closing of public roads by defendant Hardwicke in the vicinity of lands held by Seelig as trustee for Richard Switlik and his children.

33. On or about July 14, 1976, Judge Doherty rendered a decision and opinion on the liability portion of the trial, finding Richard Switlik liable for defendant Hardwicke, *et. al*, for tortious interference with contractual relations and prospective economic advantage. (A copy of that Opinion is attached hereto and marked as Exhibit "E".)

34. Judge Doherty's opinion, which is utterly devoid of any legal citations or authorities, found Richard Switlik liable to defendant Hardwicke based upon the following facts taken as a whole:

a. that Richard Switlik participated in the financing of a lawsuit by the Environmental Commission of Upper Freehold;

b. that Richard Switlik caused 20 tons of sand to be dumped in a drainage area to the detriment of defendants;

c. that Richard Switlik appeared before the Jackson Township Planning Board and spoke out in opposition to the location of the amusement park on the Hardwicke property;

d. that Richard Switlik made numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities;

e. that Richard Switlik purchased property in the name of a trustee for his children, and his son subsequently initiated a lawsuit against Hardwicke to protect access to the property.

35. Judge Doherty further concluded in his opinion that while none of these factors alone would constitute wrongful conduct, taken together they constitute malice sufficient to hold Richard Switlik liable to defendants therein.

36. The actions of Richard Switlik which form the basis of Judge Doherty's opinion are clearly protected by the First and Fourteenth Amendments to the U.S. Constitution, and by Article IV, Section 2, Clause 1 of the U.S. Constitution.

37. During the trial Judge Doherty had characterized the "main thrust of the case" as being whether or not Richard Switlik was harassing defendant Hardwicke through the valid exercise of his rights to petition the courts for a redress of grievances and to petition various governmental agencies to assure conformance with the law.

38. Although Judge Doherty had indicated on the record during the trial that he would determine whether or not the Switliks' activities were lawful or unlawful as a prerequisite to determining their overall liability, the Judge's opinion shows that he never determined the protected nature of the activities engaged in by plaintiffs herein, but found rather that the exercise of constitutional rights taken together constituted malice which formed the basis for the Court's opinion.

39. On or about January 11, 1977, the trial on damages commenced and, following a 30-day trial, Judge Doherty rendered his decision in a Letter Memorandum Opinion dated August 26, 1977. (A copy of this Opinion is attached hereto as Exhibit "F".)

40. Judge Doherty rendered judgment against Richard and Stanley Switlik jointly and severally for their participation in a fraud with respect to Parcel 10C in the sum of $4,910,423.00 together with interests and costs; and against Richard Switlik individually in the sum of $1,432,449.00 for tortious interference with contractual and prospective economic advantage.

41. The damages against Richard Switlik included specific assessments for his roles in the trust property suit and the Upper Freehold Environmental suit. The opinion based most of the damages, however, on the delay in the opening of Great Adventure because of post-closing filing of the deed for Parcel 10C by the Switliks. The opinion did not consider the role that the Switliks' constitutionally protected petitions and appeals to public officials and bodies may have had on that opening date. The findings of Judge Doherty with respect to the malicious interferences of Richard Switlik necessarily influenced and intertwined with the finding of malicious fraud with respect to Parcel 10C. Because constitutionally protected activity is involved, the entire judgment is suspect.

42. On May 31, 1979, the Appellate Division of the New Jersey Superior Court affirmed the trial court's determination in a *per curiam* opinion devoid of any case citations or other legal authority. (A copy of that Opinion is attached hereto as Exhibit "G".)

43. On October 9, 1979, the Supreme Court of New Jersey, without opinion, denied petitioners' timely request for certification. A Motion for Reconsideration was filed by plaintiffs herein, and the New Jersey Supreme Court denied that Motion on December 21, 1979, again without opinion.

44. Defendant Hardwicke Co., *et. al.*, initiated proceedings for the purpose of executing upon the judgment of record entered in this matter. (See letter dated March 5, 1980 attached hereto as Exhibit "H".)

45. Defendant Sheriff Arthur Brown as an officer of the Superior Court of New Jersey of Ocean County is charged with the duty of executing on judgments of record entered upon the dockets of that Court.

COUNT I

1. All of the allegations appearing in paragraphs 1 through 44 above are incorporated herein and made a part hereof.

2. Plaintiffs allege that the opinions rendered by the Superior Court of New Jersey, Ocean County and affirmed on appeal constitute a violation of plaintiffs' civil rights and civil liberties as protected by the First and Fourteenth Amendments to the U.S. Constitution.

3. Plaintiffs allege that entry of and execution on this multi-million dollar judgment by the Sheriff of Ocean County violates plaintiffs' rights under the First and Fourteenth Amendments to the U.S. Constitution, as well as their privileges and immunities as U.S. citizens

which are guaranteed by Article IV, Section 2, Clause 1, of the U.S. Constitution.

4. Plaintiffs allege that the State of New Jersey has failed to afford plaintiffs due process of law as required by the Fourteenth Amendment to the U.S. Constitution in that the opinions rendered by the Superior Court of New Jersey, Ocean County and affirmed *per curiam* on appeal are utterly devoid of any case citations or legal authority which would support this multi-million dollar judgment.

WHEREFORE, Plaintiffs request this Honorable Court as follows:

a. Enter a preliminary and permanent injunction enjoining the Ocean County Sheriff from executing upon the Judgment of record appearing at Docket No. C-371-73 of the Ocean County Courts;

b. Enter an Order directing that the judgment of record appearing at Docket No. C-371-73 of the Ocean County Courts be vacated;

c. Retain jurisdiction of the within matter;

d. Grant plaintiffs' attorneys fees and costs and such other relief as this Court may deem proper and just.

COUNT II

1. Thomas J. Muccifori is an attorney at law in the State of New Jersey who at all pertinent times hereto represented both the plaintiffs and defendant, Hardwicke Co., in the matter of *Switlik vs. Hardwicke, et. al.*, C-371-73 as more fully detailed below.

2. On or about April, 1974, plaintiff Stanley Switlik retained Thomas Muccifori, Esq. to represent him on several matters related to the environmental impact of

the proposed Great Adventure Park on the properties contiguous to land which formed the subject matter of the Agreement for Sale referred to in paragraph 12, *supra*.

3. Thomas Muccifori was privy to numerous conversations concerning the proposed use of the land owned by the defendant Hardwicke and particularly to environmental hazards surrounding said uses and construction.

4. Thomas Muccifori corresponded with counsel for Hardwicke seeking environmental impact reports as well as other information concerning the proposed facility.

5. Thomas Muccifori corresponded with numerous state and local agencies in behalf of plaintiffs with regard to noise and water pollution as well as other environmental concerns.

6. On or about February, 1976, Thomas Muccifori became counsel to defendant Great Adventure and prepared deeds transferring certain tracts then owned by defendant Great Adventure to Jackson Township.

7. On or about June 15, 1976, Muccifori wrote to plaintiff Richard Switlik asking him to kindly remove the voluminous files relative to the litigation referred to in paragraph 22, *supra*, as well as other matters related to the uses of land by defendants Great Adventure and Hardwicke. (See Exhibit "I" attached hereto.)

8. During 1974 and 1975 and part of 1976, Muccifori alleged represented the interests of plaintiffs not to seek review of Judge Addison's decision with the New Jersey Supreme Court. (See Exhibit "J" attached hereto.) This decision became res judicata against the Switliks in the subsequent trials.

9. Muccifori was privy to numerous conferences concerning plaintiff's position on settlement of the matter of *Switlik vs. Hardwicke, et al.*, C-371-73 and in fact ad-

vised Stanley Switlik not to pursue an appeal of Judge Addison's decision predicated upon the possible of a favorable settlement.

10. After representing and advising plaintiffs with regard to negotiation surrounding the matter of *Switlik vs. Hardwicke et. al.*, Muccifori switched sides and began to represent defendant Great Adventure in securing easements, deeds, and various other agreements with the Jackson Township municipal authorities.

11. On information and belief plaintiffs aver that defendants Hardwicke and Great Adventure maliciously and consciously lured Muccifori into their employ to capitalize on his prior representation of plaintiffs, all to the economic disadvantages of plaintiffs.

12. Defendants' conduct in encouraging this improper conduct was done with a malicious and wrongful intent to interfere with plaintiffs' prospective economic advantage, and to secure the judgment of record entered in this matter.

WHEREFORE, Plaintiffs request this Honorable Court as follows:

A. to render judgment in excess of $6,000,000.00 together with interests and costs as compensatory damages of the wrongs suffered by plaintiffs herein;

B. to award punitive damages for the wilful and malicious conduct of defendants herein;

C. to award such other relief as may be deemed just and fair under the circumstances.

PELLETTIERI, RABSTEIN
AND ALTMAN
(Attorneys for Plaintiffs)

By: /s/ Richard M. Altman, Esq.
RICHARD M. ALTMAN, ESQ.

JURY DEMAND

A trial by jury is demanded as to all issues raised by the within complaint.

/s/ Richard M. Altman, Esq.
RICHARD M. ALTMAN, ESQ.
Attorney for Plaintiffs

VERIFICATION OF COMPLAINT
CIVIL ACTION NO.

I, STANLEY SWITLIK, of the Township of Marathon, County of Monroe, State of Florida, certify as follows:

1. I am a Plaintiff named in the foregoing complaint and have read the same.

2. I hereby certify that the matter and things set forth herein are true and correct to the best of my understanding, knowledge and belief.

3. I am aware that if any of the foregoing is wilfully false, I am subject to punishment.

/s/ Stanley Switlik
STANLEY SWITLIK

VERIFICATION OF COMPLAINT
CIVIL ACTION NO.

I, RICHARD SWITLIK, of the Township of Allentown, County of Monmouth, State of New Jersey, certify as follows:

1. I am a Plaintiff named in the foregoing complaint and have read the same.

2. I hereby certify that the matter and things set forth therein are true and correct to the best of my understanding, knowledge and belief.

3. I am aware that if any of the foregoing is wilfully false, I am subject to punishment.

/s/Richard Switlik
RICHARD SWITLIK

EXHIBIT "A"
LETTER FROM GOVERNOR CAHILL TO MR. & MRS. STANLEY SWITLIK, DECEMBER 28, 1970

Dear Mr. and Mrs. Switlik:

I want to personally extend to you on behalf of all the people of the State of New Jersey and myself, sincere thanks for your generosity in deeding 51 acres of land located in Jackson Township, Ocean County to the State of New Jersey for use as a wildlife refuge, for conservation of soil, water, trees and other vegetation and other resources, as well as certain other specified public uses.

I am sure many generations of New Jersey residents, and visitors to the State will have many hours of enjoyment by virtue of your gift. In addition, the preservation of this piece of New Jersey in its natural state will contribute to the improvement of our environment.

Sincerely,

/s/William T. Cahill
WILLIAM T. CAHILL
GOVERNOR

Mr. and Mrs. Stanley Switlik
Switlik Parachute Co., Inc.
P.O. Box 1328
Trenton, New Jersey 08607

December 28, 1970

EXHIBIT "B"
OPINION OF THE HONORABLE MARK ADDISON, SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, DECEMBER 20, 1973

December 20th., 1973

E. John Wherry, Jr. Esq.,
340 West State Street
Trenton, N.J.

and

Frederick Becker, Esq.
Wilentz, Goldman and Spitzer
252 Madison Avenue
Perth Amboy, N.J. 08862

Re: Stanley Switlik and Wanda Switlik vs. The Hardwicke Corporation; Great Adventures, Inc.
Ackerman-Ney Associates, etc.
Docket No. C-371-73

Gentlemen:

As I made clear to the parties throughout the hearings, this decision will concern itself with but three aspects of the litigation:

1. The location of the northwesterly side line of a tract of 91.24 acres.

2. The disposition of a triangular parcel known as 10C.

3. The question of access to lands of the plaintiffs from Reid Road across lands conveyed to the defendant Hardwicke N.J. Preserves, Inc.

All other matters in issue not having such a degree of urgency, they will be dealt with after further hearings yet to be scheduled.

No attempt will be made to summarize 19 days of testimony. The general factual framework in which these three problems hang suspended is ralatively simple. On May 24, 1972 a contract of sale (P-29) was executed between the plaintiffs as sellers and defendant Hardwicke as purchaser for lands outlined generally on a sketch attached thereto as Schedule A. This did not purport to be a survey. It was merely an approximation of about 820 acres, more or less, which the parties appear to have intended as the subject of the contract. Ultimately and on June 21, 1973, the actual conveyance (P-1) transferred about 775 acres to the defendant.

Between those two dates each of the parties made surveys, the defendant made a title examination and negotiations began between the parties to determine what the contract in fact called for and where certain property lines should be located.

The first question to be resolved is the location of the boundary line in the northwesterly portion of the 91.24 acre tract. This parcel is described by metes and bounds in Schedule A of P-1 on page 7 thereof, is entitled "Parcels 148 A & B" and calls for "3 acres more or less." It is important to note that interminable conferences between the parties' representatives, abortive attempts at closings, field trips to the premises and attempts to agree on what had been intended in this area, convince me that the parties had in fact never agreed on where the line was to be or what was to be conveyed in the area in question.

The 'Lanning' survey for the plaintiff and the 'Scharfenburg's survey for the defendant both made after (P-29) neither agreeed with each other nor with the plotting of the descriptions of the 91.24 acres. Plaintiffs contend "148 A & B containing 3 acres" controls. They were then and still are the owner of large areas in Jackson and adjoining townships made up of many parcels. To identify them a personal numbering system had been adopted by the plaintiffs-hence the aforementioned designation. The fact that it is preceded by a metes and bounds description for 91.24 acres is, the plaintiffs contend, only to identify the whole tract of which it is part. They also insist that since several parcels admittedly within the 91.24 acre tract are separately described in Schedule A of P-1 (which parcels aggregate about 65-68 acres) and approximately 23 acres of the 91.24 acres are not so described, that those 23 acres were not included in the sale. It is well established that in such case a metes and bounds description controls over an area call. The defendant says it intended to get all of the larger tracts and that this was their understanding of the contract.

All the testimony indicates that the plaintiffs wanted the property lines far enough from their home and the ponds to the south and east of it to have protection from what they knew would be the commercial use intended by the defendant. It, on the other hand, while understanding the Switlik's position, desired and intended to acquire lands with sufficient wooded growth conveniently located to facilitate the use of the property as a 'safari park' for exhibition at close range of exotic imported animals with 'drive thru' roads and trails apparently modeled after KreugerNational Park in South Africa.

I find that there was not a common understanding of exactly what parcels (nor the extent thereof) were included in the contract of sale. Each party obviously had something in mind different from that in the mind of the other. The subsequent protracted negotiations to establish terms and subject matter are sufficient evidence of that. The acceptance by the defendant of P-1 in its final form reinforces that conclusion. Although the plaintiffs insisted that it recite the description of each tract included in the sale by the same description by which they had acquired it, instead of by a single survey description as requested by the defendant, and the plaintiffs prevailed, plaintiffs believed they had retained the 23 acres more or less and the defendant considered it was included in the conveyance. The subsquent acceptance and filing of a subdivision map after June 21, 1973 does not change that conclusion.

The court has therefor undertaken to establish the northwesterly line of the 91.24 acre tract to accomplish the original intentions of both parties, i.e., to protect the plaintiffs home from unwarranted intrusion and the inquisitive peering of total strangers, at the same time enabling the defendant to have the benefit of much of the very type of terrain in this area which its contemplated operation requires. That tract boundary is more particularly described as follows:

> BEGINNING at a point in the 4th course of a tract of 91.24 acres returned to Thomas DeBow on October 30, 1857 and recorded in the Office of the Surveyor General of East Jersey in Book S-22 at page 486 et.seq., distant 400 feet southerly from the 3rd corner of said tract, thence running northeasterly 1575 feet more or less to a point being 190 feet more or less easterly of the 2nd corner of the whole tract and at the common intersection of the 2nd course of the whole tract, the 'Scharfenberg line' and the Lanning line, as set out in D-24.

The second question to be resolved is the disposition of 10C. Exhibit E of P-29 shows a triangular parcel north of Reid Road. It is marked (10C) to indicate title in the State of New Jersey. At all times prior to execution of P-29, the plaintiffs agent Sanley Ash indicated ownership to be in the State as shown on the aforementioned exhibit. The defendant was advised that acquisition from the State would pose no problem, since an exchange of other lands being acquired from the Switliks for 10C could easily be arranged.

In 1964 the plaintiffs had conveyed large tracts of land south of Reid Road to the State. The descriptions of the tractstherein had included a gore some 1200 feet more or less in length and with a frontage on Reid Road of about 200 feet. This gore effectively divided the lands being acquired by the defendant and would prevent the use of much of the acreage for the exotic animal park.

That fact was known to the plaintiff. Based on the representations of Ash and of Richard Switlik, son and agent of the plaintiffs and actively engaged in the various negotiations in their behalf, the defendant had begun negotiations with the State to acquire 10C. At all times up to June 21, 1973 the defendant was advised by Richard Switlik that title to this parcel was in the State. However, in July 1973 the plaintiffs executed an 'amended conveyance' whereby 10C was excepted out of the lands previously conveyed to the State in the 1964 deed. In explaining this unusual action, Richard Switlik testified that the plaintiffs had *always* claimed title to this parcel that it was not intended to have been conveyed. When he learned that the State's deed included it, he had gone to Trenton. There, in the files of the appropriate agency he testified he had found the last page of the descriptions furnished with the 1964 deed which somehow, he testified, had become separated from the remainder prior to recording. This page excepted from the conveyance to the State all lands lying north of Reid Road (where 10C is located). It was on the basis of this finding that a new deed was executed by the plaintiffs in mid-July 1973 and recorded.

It can only be concluded that the defendant was deliberately misled by the plaintiffs. The need of the defendant for this parcel was known to the plaintiffs, who appear to have deliberately disguised the truth to the damage of the defendant.

A constructive trust is impressed on parcel 10C in favor of the defendant and the plaintiffs are directed to convey the same to it. Payment therefor shall be in accordance with the formula established in P-29.

The remaining question concerns the ingress and egress of the plaintiffs across the lands conveyed to the defendant to and from their home. P-1 provides the answer. Page 2 of that deed reserves to the plaintiffs an easement from Reid Road as shown on Schedule B attached thereto. Testimony has referred to it as the Gun Club Road. There is no reservation in P-1 of any easement other than that. Therefor the former access running northwesterly from Reid Road across parcel 10C is no longer available to the plaintiffs. It should be noted that the plaintiffs had other ingress and engress to and from their home to the Prospertown and Monmouth roads.

Finally, the restraint heretofore imposed on the defendant by the Appellate Division of the Superior Court is hereby lifted.

An order may be presented in accordance with this opinion.

Very truly yours,

/s/ Mark Addison
MARK ADDISON,
JUDGE, OCEAN COUNTY COURT.

ma/np

FINAL JUDGMENT

May 6, 1974
Certified to be
A TRUE COPY
WILENTZ, GOLDMAN & SPITZER

By: Frederic K. Becker
A Member of the Firm

WILENTZ, GOLDMAN & SPITZER
252 Madison Avenue
Perth Amboy, New Jersey 08862
(201) 825-0700
Attorneys for Defendants and Counter-
Claim Plaintiffs, Hardwicke
Companies Incorporated, Great
Adventure, Inc. and Hardwicke's
New Jersey Preserves, Inc.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
OCEAN COUNTY
Docket No. C-371-73

STANLEY SWITLIK and WANDA SWITLIK,

Plaintiffs,

vs.

THE HARDWICKE CORPORATION; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC., jointly, severally and in the alternative,

Defendants.

HARDWICKE COMPANIES INCORPORATED
GREAT ADVENTURE, INC. and
HARDWICKE's NEW JERSEY PRESERVES,
INC.,

Counterclaim-Plaintiffs

vs.

RICHARD SWITLIK,

Additional Defendant
on Counterclaims

This matter having been tried before the Hon. Mark Addison, sitting without a jury, said trial having been limited to the issues raised by the application for injunctive relief set forth as part of the First Count of the Amended Complaint and to all claims and issues raised by the Second Count of the Amended Complaint and by the Second and Third Counterclaims Against Plaintiffs interposed by Defendants, all other claims and issues raised by the pleadings having been severed for separate trial at a later date, and E. John Wherry, Jr., Esq. appearing for the plaintiffs Stanley Switlik and Wanda Switlik, and Messrs. Wilentz Goldman and Spitzer by Frederic K. Becker, Esq. appearing for the defendants Hardwicke Companies Incorporated (incorrectly designated in the Amended Complaint as "The Hardwicke Corporation"), Great Adventure, Inc. (incorrectly designated in the Amended Complaint as "Great Adventures, Inc.") and Hardwicke's New Jersey Preserves, Inc. and the Court having heretofore entered an Order For Judgment dismissing the within action as to defendant Ackerman-Ney Associates, and the Court having heard and considered the testimony of the witnesses presented on behalf of the plaintiffs and on behalf of the defendants, having read and considered that portion of the transcript of the trial heretofore prepared, the exhibits introduced into evidence, the briefs submitted by counsel prior to the commencement of the trial, during the pendency of the trial and subsequent to completion of the trial, and pleadings, and having heard and considered the arguments presented by counsel, and the Court having prepared and submitted a Memorandum Opinion dated December 20, 1973 embodying the Court's findings of fact and conclusions of law pursuant to Rule 1:7-4 of the Rules Governing The Courts Of The State of New Jersey, which Memorandum Opinion directs that judgment be entered in accordance therewith, and good cause appearing therefor,

It is, therefore, on this 6th day of May, 1974

FINALLY ADJUDGED AND DECREED that: -

1. That certain deed dated June 21, 1973 between Stanley Switlik and Wanda Switlik, as Grantors, and Hardwicke's New Jersey Preserves, Inc., as Grantee, recorded on August 1, 1973 in the Ocean County Clerk's Office in Book 3324 of Deeds at page 265 which deed was marked in evidence as Plaintiffs' Exhibit 1, shall be and the same hereby is reformed so that the description of "PARCELS 148 A and B" appearing at page 7 of Schedule A of the aforesaid deed is deleted in its entirety and there is substituted in lieu thereof the following, which change in description reduces the area of "PARCELS 148 A and B" as originally conveyed by Stanley Switlik and Wanda Switlik to Hardwicke's New Jersey Preserves, Inc., such change in description and resultant conveyance of lands by Hardwicke's New Jersey Preserves, Inc. to Stanley Switlik and Wanda Switlik to be effectuated by the within Final Judgment without the need for execution or recordation of any amendatory deed or any other instrument of whatsoever nature, a certified copy of the within Final Judgment to be record-

able after the same has been filed with the Clerk of the Superior Court as a deed of conveyance in the Ocean County Clerk's Office in accordance with N.J.S. 46:16-1.1: -

> BEGINNING at the third and Southeast corner of a tract of 200 acres, returned to John Ashton on May 5, 1740 and recorded in the office of the Surveyor General of East Jersey in Book S-1, page 154; thence (1) South 65° 01′ 54″ West 1122 feet; thence (2) South 84° 31′ 54″ West 1125.11 feet; thence (3) South 19° 35′ 12″ West 1547.75 feet; thence (4) South 11° 13′ 06″ East 1302.80 feet; thence (5) North 53° 01′ 54″ East 1650.00 feet; thence (6) North 16° 52′ 06″ West 1498.20 feet; thence (7) South 77° 22′ 06″ East 1089.00 feet; thence (8) North 35° 07′ 54″ East 1155.00 feet; thence (9) North 45° 14′ 38″ West 306.86 feet to the point and place of Beginning. Containing 85.79 acres more or less.

2. Hardwicke's New Jersey Preserves, Inc. is hereby declared to be the owner of all land within the description set forth in Paragraph 1 of the within Final Judgment.

3. Any and all land, including without limitation Lot 10-C, Block 1 as shown on the Jackson Township Tax Map or otherwise and as referred to in the within proceedings (no determination being made, however, as to the existence, size or location of said Lot 10-C, Block 1) north of Reed Road contained within Parcel 240 as described in that certain deed dated April 1, 1964 between Stanley Switlik and Wanda Switlik, as Grantors, and the State of New Jersey, Department of Conservation and Economic Development, as Grantee, recorded on April 28, 1964 in the Ocean County Clerk's Office in Book 2385 of Deeds at page 16, and which was marked in

evidence as Defendant's Exhibit 22, and which deed of April 1, 1964 purports to be modified by that certain "Corrected Warranty Deed" dated July 10, 1973 between Stanley Switlik and Wanda Switlik, as Grantors, and the State of New Jersey, Department of Conservation and Economic Development, as Grantee, recorded on July 13, 1973 in the Ocean County Clerk's Office in Book 3319 of Deeds at page 479, and which deed dated July 10, 1973 was marked in evidence as Defendant's Exhibit L shall be and hereby is declared to be conveyed by Stanley Switlik and Wanda Switlik to Hardwicke's New Jersey Preserves, Inc. upon this Court's declaration of a constructive trust with rights to said land as set forth in this Court's above referred to Memorandum Opinion, such conveyance to be effectuated by the within Final Judgment without the need for execution or recordation of any amendatory deed or any other instrument of whatever nature, a certified copy of the within Final Judgment to be recordable, after the same has been filed with the Clerk of the Superior Court, as a deed of conveyance in the Ocean County Clerk's Office in accordance with N.J.S. 46:16-1.1.

As a result of this conveyance, all land to the extent not otherwise conveyed to Hardwicke's New Jersey Preserves, Inc. lying in the area bounded (a) on the South by Reed Road, (b) on the East by a line beginning at a monument on the north side of Reed Road, said monument being located at the southwesterly corner of Lot 63, Block 1 as shown on the Jackson Township Tax Map; thence on a course N 45° 04′ 07″ W a distance of 2,867.34′ to a monument, said monument marking the most westerly corner of Lot 58-P Block 1 as shown on the Jackson Township Tax Map, (c) on the North by a line beginning at the aforesaid monument marking the most westerly corner of Lot 58-P, Block 1 shown on the Jackson Township Tax Map and extending southwesterly to the beginning point or northerly terminus of the third course of the parcel described in Paragraph 1 of the within Final Judgment, and (d) on the west by the lines formed by the third and fourth courses of the parcel described in Paragraph 1 of the within Final Judgment extending to the point where they intersect Reed Road, shall be and is hereby adjudged and declared to be the property of Hardwicke's New Jersey Preserves, Inc. The aforesaid sweep description is intended to clarify the effect of the conveyance described in this Paragraph 3 and does not in any way limit the description of property conveyed by the above referred to deed of June 21, 1973 between Stanley Switlik and Wanda Switlik, as Grantors, and Hardwicke's New Jersey Preserves, Inc. as Grantee, which deed was recorded on August 1, 1973 in the Ocean County Clerk's Office in Book 3324 of Deeds at page 265, and said deed was marked in evidence as Plaintiffs' Exhibit 1, which deed by its terms conveys other land to the southwest, northwest, east and northeast of the sweep description area described herein.

4. In consideration of the conveyance ordered pursuant to Paragraph 3 of the within Final Judgment, and in accordance with the formula set forth in this Court's aforesaid Memorandum Opinion Hardwicke's New Jersey Preserves, Inc. shall pay to Stanley Switlik and Wanda Switlik, by certified or cashier's check or account check of Messrs. Wilentz, Goldman & Spitzer, payable to the order of Stanley Switlik and Wanda Switlik, the sum of FIVE THOUSAND TWO HUNDRED FORTY-FOUR DOLLARS ($5,244.00) such certified, cashier's or attorney's trust account check to be delivered to E. John Wherry, Jr., Esquire., at 340 West State St. Trenton, New Jersey 08618 within forty-eight (48) hours from or after the date of entry of the within Final Judgment. There is expressly left open the question as to whether any payment is required from Hardwicke's New Jersey

Preserves, Inc. to Stanley Switlik and Wanda Switlik or from Stanley Switlik and Wanda Switlik to Hardwicke's New Jersey Preserves, Inc. by virtue of the payment pursuant to Paragraph 1 hereof of acreage conveyed; if such adjustment is ultimately required by this Court, same to be based upon the same formula as set forth in Plaintiff's Exhibit 29, *i.e.* $2500 per acre plus a *pro rata* portion of the $100,000 additional payment called for by the terms of Plaintiff's Exhibit 29.

5. The divisions of land effectuated by Paragraphs 1, 2 and 3 hereof are hereby declared to be divisions of property by Court order within the meaning of N.J.S. 40:55-1.2; nevertheless Hardwicke's New Jersey Preserves, Inc., without the need to have approval thereof or consent thereto by Stanley Switlik or Wanda Switlik, shall have the right to file a map with the Planning Board of the Township of Jackson as and for a minor subdivision plat reflecting such division and/or consolidating the property conveyed to Hardwicke's New Jersey Preserves, Inc.

6. Stanley Switlik and Wanda Switlik shall have no right of easement or right of way for purposes of ingress, egress or otherwise, over, across or through lands owned by Hardwicke's New Jersey Preserves, Inc. except to the extent as set forth in (i) the ____ paragraph at page 2 of the above referred to deed of June 21, 1973 between Stanley Switlik and Wanda Switlik, as Grantors and Hardwicke's New Jersey Preserves, Inc., as Grantee, which deed recorded on August 1, 1973 in the Ocean County Clerk's Office in Book 3324 of Deeds at page 265, and which deed was marked in evidence as Plaintiffs' Exhibit 1, subject to all of the ____ provisions with respect to said access easement as set forth in said deed of June 21, 1973; and (ii) the grant of easement dated June 21, 1973 between Hardwicke's New Jersey Preserves, Inc., as Grantor, and Stanley and P. Wanda Switlik, as

Grantees, ____ on August 2, 1973 in the Ocean County Clerk's Office in Book of Deeds at page 1; and all other claims of plaintiffs with respect to access rights of whatsoever nature, over across or through lands owned by Hardwicke's New Jersey Preserves, Inc. are hereby declared to be null and void and, more particularly but without limiting the generality of the foregoing, it is hereby declared that the former access road running in a general W direction from Reed Road to lands retained by plaintiffs, and a portion of which access road crosses a portion of the land referred to Lot 10-C, Block 1 as Lot 10-C, Block 1 is the map prepared by Lanning Sanitary Engineering Co. and marked Plaintiffs' Exhibit 18, is hereby declared to be available to the plaintiffs for any purpose whatsoever and rights which plaintiffs may have had in or to said access are hereby specifically declared to be null and void and of no or effect whatever.

7. All restraints heretofore imposed upon defendants, any of them, in the within proceedings are dissolved in their entirety from and after December 20, 1973, the date of ____ Memorandum Opinion in this matter.

8. There is no just reason for delay in entering the ____ Final Judgment upon less than all of the claims in the within proceedings, the within Final Judgment dealing with ____ separate claims, certain other claims having been severed for separate trial at a later date.

9. The within Final Judgment is entered without the imposition of costs in favor of or against any party hereto.

MARK ADDISON, J.C.C.
(J.S.C.D.)

EXHIBIT "C"
LETTERS FROM RICHARD SWITLIK TO STATE AGENCIES

May 21, 1975

Department of Environmental Protection
State of New Jersey
P.O. Box 1390
Trenton, New Jersey 08625

Attention: Mr. Alfred T. Guido

Subject: Great Adventure

Gentlemen:

When the impact report of Great Adventure was submitted and approved by your office there were several environmental impact problems among which—but not limited to—were the following:

1. Noise Pollution
2. Water Pollution
3. Runoffs from the Parking Lots

It is believed that the Department of Environmental Protection should now check what was promised and what actually is being done.

Attached is a copy of a DEP memo dated March 26, 1974, wherein you indicated that serious consequences would result if there were violations of the noise ordinance. It is regrettable that there is a violation based on the letter dated September 19, 1974, copy attached.

Those noise violations have not yet been resolved. The bull horns on the jungle wagons still blare above the decibel level of the state's statutes, and the rock bands can be heard at times two miles away from the park.

You will recall the parking areas were to come under strict air quality control, and rain water runoffs were to filter into the sands so that motor acids would not go into the Prospertown State Lake and the Switlik Lake. (The Prospertown State Lake is now under your jurisdiction also as Acting Director of Parks and Forests). The water pollution with fecal matter is still flowing into the streams which will be used for bathing.

The three conditions mentioned above were previously brought to the attention of your office, the planning engineers, etc., and since approval was given it is requested that your office advise what will be done to correct the above mentioned conditions.

Sincerely yours,

Richard Switlik

RS:jcw

Attachments

August 15, 1974

Department of Environmental Protection
State of New Jersey
P.O. Box 1390
Trenton, New Jersey 08625

Attention: Mr. Alfred T. Guido

Dear Mr. Guido:

Now that the Great Adventure Safari Theme Park has been opened with the blessings of the Department of Environmental Protection, it is believed that the enforcement authorities of your department should balance out what was promised by Great Adventure in their environmental impact reports, which reports were the basis of your approval.

Periodically it is my intention to submit to your office various discrepancies. These discrepancies naturally can be swept under the rug which will be a precedent for other environmental impact studies in the future.

As an example.

(1) The traffic engineers who made the traffic analysis should turn in their slide rules. It is unknown how a reputable firm could be so far off their estimates on traffic congestion.

(2) Attached is page 58 which details measured sound levels at a west coast amusement park. The two highest DBA levels, rock band and steam train whistle having DBAs in excess of 100, are marked with an asterisk with a notation not to be included in Great Adventure. These both are included in Great Adventure's amusement center and are both in violation of the noise statutes of the State of New Jersey.

(3) Due to the rapid runoff of rain water resulting from the almost total removal of ground vegetation, the

water levels on the Switlik property including reservoirs have dropped over one foot from their normal summertime levels. These reductions in the water level will have some significant effect on the Prospertown State Lake since these lakes and reservoirs on the Switlik properties flow into the Prospertown State Lake.

At one time in one of the many letters between your office and our office you indicated that you would have a conference with me "within ten days." This has been several months ago. It is requested that you give the writer the courtesy of viewing the environmental impact from the other side of the fence.

Please contact the writer in order that we may arrange for a mutual time for on-the-site inspection.

Sincerely yours,

Richard Switlik

RS:jcw

Attachment

August 15, 1974

Bureau of Water Pollution Control
Division of Water Resources
Department of Environmental Protection
P.O. Box 2809
Trenton, New Jersey 08625

Attention: Mr. Robert L. Vincent

Dear Mr. Vincent

Attached is a copy of your letter dated May 24th to the Jackson Township Municipal Utilities Authority.

We have been testing by certified laboratories the waters flowing onto our properties, and in many instances the BOD count is above 2,400. We have referred this matter to the Ocean County Board of Health, the State Board of Health, and the Township Board of Health.

The State Board of Health did conduct certain tests but prior to a rain where the fecal matter would not move by normal drainage into the various streams. Our tests were conducted after a rain as required in paragraph 4, page 2, of the previously mentioned letter.

The Ocean County Board of Health stated that the tests submitted by us had no validity because they were conducted after a rain.

Paragraph 10, page 3, states that "At no time will any animal wastes be deposited directly or indirectly in any intermittent or permanent streams." Attached are two photographs showing manure in the bear cages adjacent to a permanent and intermittent stream bed. This matter was brought to the attention of the Jackson Township Municipal Authorities and their consulting engineers, with the explanation that the situation was bad and something had to be done. The Board of Health gave Great Adventure another period of relief because Great

Adventure was taking corrective action to correct the pollution flowing off their property on to ours.

Take a firm hold onto your seat since their method of correcting the pollution is novel and inexpensive and may be the solution to all the pollution in the State of New Jersey.

THEY PLANTED REED GRASS AND A FEW CLUMPS OF CRANBERRY VINES INTERMITTENTLY FOR A DISTANCE OF ABOUT TEN FEET IN THE STREAM BED.

For this two bit solution, the Board of Health gave them clearance. If this is a satisfactory solution approved by your department we better throw the sponge in as far as clean water in our state is concerned.

Another area of great concern is the low water level in all the Switlik lakes and reservoirs. This low water has resulted from rapid runoff of rain water with a resulting lack of flow during the periods of drought. These lakes and reservoirs are the head waters of the Prospertown State Lake, and any low resulting at these points will ultimately be reflected in the lake.

It is requested that your office together with representatives of the State Board of Health give me the curtesy of an on-site inspection from our side of the fence. The State Board of Health did run certain tests. They never came over on Switlik property in the problem areas, and all their tests were run before the storm episode required in your May 24th letter.

Please contact the writer for a mutually acceptable time for this visitation.

Sincerely yours,

Richard Switlik

May 29, 1974

Mr. Alfred Guido
Department of Environmental Protection
State of New Jersey
P.O. Box 1390
Trenton, New Jersey 08625

Dear Mr. Guido:

There is being delivered to you an aerial photograph taken during May 1974 of the Great Adventure "animal theme" park. This photograph was made by Aero Service, aerial photographers of Philadelphia, Pennsylvania. Sectional enlargements are available at a nominal cost. This photograph is a scale of 400 feet equals one inch. We can have sectionalized enlargements made of 200 feet to the inch.

For your consideration, the following comments are made.

Note the sedimentation beds for the sewage system are already completed. They are specifically located on the "continental divide" of New Jersey where the outflow from the sewage can be discharged westerly through Lahaway Creek, Crosswicks Creek into the Delaware River, or easterly through Toms River and Barnegat Bay.

Note the discoloration of Switlik Lake and Prospertown State Lake as compared with all the other lakes in the area.

Note also that the Great Adventure impact report states they have removed only 20 percent of the trees. It would appear that they have left only 20 percent of the trees, and have completely removed all ground vegetation and flora which will contribute to rapid runoff in periods of heavy rain causing severe drought during the dry seasons. The condition resulting would be comparable to the flooding in the area of Assinpink Creek caused by rapid runoff.

Note also the large areas of land mining. I recognize that this is a local problem and subject to local ordinances. Just yesterday Mr. John Kiebler, Jackson Township Clerk, stated "yes, it is against the law to bury stumps but what can they do to dispose of the debris." It is apparent that the township hasn't considered the possibility of transporting the stumps to other areas where landfill is available.

For your further consideration, we visited the area where the sewage sedimentation beds were being built and as of the morning of May 25th work was continuing contrary to the notification being given.

In view of the fact that many people in the area do have serious reservations concerning the feasibility of the proposed sewage system of spray irrigation in a recharge area where the water table averages only four to five feet below the surface, the state authorities should avail themselves to any outside experts. I understand that very capable and qualified people are available and are willing to testify if given the opportunity, and it is hoped that the State of New Jersey will at least listen to their comments prior to its decisions.

Sincerely yours,

Richard Switlik

RS:jcw

May 13, 1974

Department of Environmental Protection
Division of Water Resources
Bureau of Water Pollution Control
P.O. Box 2809
Trenton, New Jersey 08625

Subject: Great Adventure Sewage System

Gentlemen:

Yesterday while checking my property designated as Block 1, Lot 58J, on the Jackson Township tax map, I noted that there was some construction within 75 feet of my property line. As this is classified as a residential area, I questioned the two Great Adventure engineers who were accompanying me as to what the construction was. They indicated that there was being built sedimentation tanks for the sewage sludge and other piping within the ground was discharging the water through spray irrigation over the pasture lands. These sedimentation tanks and underground piping are substantially complete.

In view of the fact that sludge tanks do give off offensive odors, I would appreciate information as to when a permit was granted for this sewage construction, and where I may see the drawings as I am a contiguous landowner. Or, if this is an illegal construction, are steps being taken to rectify the illegality?

I have been told that it is Great Adventure's goal to open the safari and amusement part either with or without the necessary permits, approvals or licenses thereby testing the State's ability to enforce its sewage and noise pollution statutes.

If Great Adventure is permitted to proceed with sewage plant construction without the necessary permits and approvals by the Department of Environmental Protection, a bad precedent will be set for other developers.

Sincerely yours,

Richard Switlik

RS:jj

May 7, 1974

Mr. David J. Bardin
State Commissioner
State of New Jersey
Department of Environmental Protection
P. O. Box 1390
Trenton, New Jersey 08625

Dear Mr. Bardin:

Congratulations on your appointment as the new Commissioner. As you know, your department was previously called the Department of Conservation and Economic Development. I believe that the change in name to Department of Environmental Protection swings the balance towards the conservation of our heritage rather then economics, although I believe that both can live together.

No doubt a decision you will be faced with will be the approval or disapproval of the environmental impact report for Great Adventure which is opening a drive-through animal park and an amusement complex in central New Jersey Quite obviously they have been going full speed ahead, believing that approvals will be forthcoming. No doubt some of the greatest political pressures will be exerted in this matter.

You will be taken on a public relations tour through the complex and will see the beautiful landscaped areas and exotic animals. With this we find no fault. The grass is beautiful, the area is landscaped, and the animals are exotic.

But before you make your decision, afford me the privilege of giving you a conducted tour on the other side of the fence. Surrounding the complex are lands owned by the Fish and Game Commission. Immediately below the complex and adjacent thereto is the Prospertown

State Lake, donated by Stanley Switlik for public use and conservation.

It is with the noise impact of the amusement complex, the traffic bottlenecks, and with drainage into adjacent property and the state lake with which I am concerned.

I understand that the State Department of Parks, under Mr. Joseph Truncer, submitted a report which has already been seen by other persons which states something to the effect that it may be necessary to close Prospertown State Lake as a result of the complex. It would be appreciated if this report be made public record, and you would tour the area surrounding the park with me at your convenience.

The history of Stanley Switlik, my father, and the entire Switlik family has been one of close cooperation with the Department of Environmental Protection and its predecessors. You can rest assured that we will support your department in the protection and enforcement of environmental regulations.

In closing, I just say, welcome aboard.

Sincerely yours,

Richard Switlik

RS:jcw

May 2, 1974

Mr. John Kiebler
Jackson Township Clerk
Jackson Township, New Jersey

Dear Sir:

It is noted that the Jackson Township Planning Board on April 24th approved the consolidation map of the properties reputed to belong to Great Adventure, Inc.

By this letter I am protesting this approval as I have reason to believe that certain lands incorporated in the consolidation map are titled in my name and in others' and not in the name of Great Adventure, Inc. This matter was previously brought up by me when I appeared before the Planning Board, and also when I visited the office of Mr. John Ernst III, who incidentally surveyed some of the lands in question.

Another basis of my protest is that certain tracts being consolidated have never been properly rezoned by the Jackson Township Zoning Board and are still zoned residential. This was first brought to the attention of the Township attorney on January 8th by certified mail. Again, the matter was either overlooked or ignored.

It is my belief that the two lots in question; namely, Block 146A and Block 138B, can only be rezoned by action of the Zoning Board after proper notice and hearings. By this letter I believe that my protest is both valid and timely.

Acknowledgment and comments to the above would be appreciated.

Sincerly yours,

Richard Switlik

RS:jcw

April 23, 1974

Jackson Township Committee
Jackson Township, New Jersey

Dear Sirs:

As your committee knows, Jackson Township DOES have a mining ordinance which strictly and specifically prohibits the burial of trees, stumps, etc., in the borrow pit. Attached is an article which recently appeared in a local paper wherein a contractor was accused of dumping stumps, branches, and the like, into a pond.

Attached also is page 83 of the Great Adventure, Inc. impact report dated February 19, 1974, where they state that it is their intention to "refill the borrow pit with unsuitable materials such as tree stumps and muck."

I hope that it is not too much to ask the township committee for an explanation as to why ordinances are not adhered to, since other people within the township might very well use the present situation as a precedent for the future.

It would be appreciated if you could arrange an on-the-spot examination of the project from the other side of the fence, with at least the following: the mayor, the building inspector, the township attorney, and the township engineer.

Your kind attention to the above matters would be appreciated.

Sincerely yours,

Richard Switlik

RS:jcw

Attachments

April 3, 1974

Mr. Alfred Guido
State of New Jersey
Department of Environmental Protection
P. O. Box 1390
Trenton, New Jersey 08625

Dear Mr. Guido:

Page 32, Section IV, Paragraph D, of the Environmental Impact Report states that water will be withdrawn for irrigation from Lahaway Creek. A map attached calls Prospertown State Lake, Lahaway Creek. If it is their intent to draw water from Prospertown State Lake under the guise of the lake being Lahaway Creek it is a subterfuge and a total violation of the deed of conveyance of the lake property by Stanley and Wanda Switlik to the State of New Jersey.

This deed of conveyance has a restrictive clause stating that the property is being conveyed for public use and conservation. The New Jersey Department of Environmental Protection is a party to this deed and it is hoped that the restrictive clauses will be enforced.

Sincerely yours,

Richard Switlik

RS:jj

Enclosure

March 27, 1974

Senator Harrison A. Williams
Senate Office Building
Washington, D. C.

Dear Senator Williams:

I was surprised and dismayed that you have permitted yourself to be used by special interest groups representing the Great Adventure Safari Development in New Jersey.

For your information and guidance, attached is a letter from Governor Brendan Byrne wherein no comments are being made in view of the litigation. As you know, through the years I have supported your policy and have been a friend of Governor Richard J. Hughes. I suppose all this refers to yesterday and not to today.

No doubt you were shown beautiful animals in well groomed pastures. With this concept we have no fault. It is with the amusement park with flume rides, noisy runaway trains, shooting galleries, etc.

I recognize that politics are involved due to the substantial legal fees being generated as a result of the controversy. You must recognize the objection is not only on Switlik's part, but also on the part of many local people who do not have the benefit of high-power public relations groups that can fly interested parties in helicopters.

For your information, Mr. Gordon Bishop of the Newark Star-Ledger wrote an investigative news article. His investigation confirmed that Hardwicke Company changed horses after agreements were signed, throwing in an amusement park.

When the Zoning Board first approved the animal park, there were no representations made to them concerning the amusements. The enabling ordinance specifically states that the park will be similar to the representations made by Great Adventure before the Zoning Board.

Did you know that the attorney who appeared before the Zoning Board and Planning Board was also the personal attorney (according to Gordon Bishop) of the chairman of the Jackson Township Planning Board? He later was appointed a judge in Ocean County.

Did you know that the New Jersey Environmental Protection Department has not yet approved the noise, or sewage? I believe the engineers who are charged with making the decisions are in the middle between their consciences and the political pressures from above.

Did you know that part of this amusement park is to be constructed on lands which we contend were rightfully the State of New Jersey's under a reverter clause, yet were deeded to the Girl Scouts for no valid consideration of one dollar, resulting in a windfall to the Girl Scouts of over $150,000? This transfer was quietly made at a time when the Switliks were being advised by the Fish and Game Commissioner, Deputy Attorney General, for the Department of Environmental Protection, Director of Land Acquisition, that no transfer of property would be made until and unless the state received an equal area of land in exchange. Yet when these statements were being made to the Switliks, already ex-Governor Cahill had given away the State's interests.

Did you know this matter was called to the State's attention as being a violation of the law pertaining to the transfer of State property and no one as yet, nine months later, has been able to satisfactorily answer our inquiries. The only explanation given to date is, "It might be embarrassing to the governor."

Did you know that a mining ordinance exists in Jackson Township which prohibits the debris of stumps, branches, etc., from being placed into the gravel hole and being covered over? Yet this is exactly what is being done.

Did you know that wildlife disruption is also a matter of environmental impact, and many domestic deer, according to a Great Adventure employee have been killed running into their fences?

Did you know that their amusement park will not meet State standards with regard to noise impact?

Did you know that Great Adventure has no right to withdraw any water or use any water from either the Switlik Lake or the state lake? Many of the beautiful bodies of water you no doubt saw from the helicopter did not belong to Great Adventure?

Did you know that the parking lot may not meet clean air standards?

With all the above in serious consideration, and many more which I could relate to you on a person-to-person basis, it is a shame that special interests are using the prestige of your office.

Sincerely yours,

Richard Switlik

RS:jcw

March 20, 1974

Mr. Alfred Guido
State of New Jersey
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

Dear Mr. Guido:

Attached are two copies of a noise impact report pertaining to Great Adventure's amusement park. Our conclusions are that the park cannot conform to the noise impact requirements of HUD and the State of New Jersey.

If you require additional copies of this report, we will furnish same.

Sincerely yours,

Richard Switlik

RS:jcw

March 18, 1974

State of New Jersey
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

Attention: Water Policy and Supply Council

Subject: Great Adventure, Inc.

Gentlemen:

Pages 32 and 33 of the Environmental Impact Report dated February 10, 1974, state that ground water diversion from the Raritan Formation will be approximately 7,800,000 gallons per month and that a diversion request will be applied for from the New Jersey Water Policy and Supply Council.

In a flight in the area on March 4th, there was observed what appeared to be a well drilling operation. It is my belief that normal procedure is to first obtain a permit, and then to drill the well. This reverse procedure of drilling a well and then asking for a permit places the Water Policy Council with almost no alternative of approving the well.

In view of the fact that there are other deep wells in the area, diversion of this water may have a detrimental effect.

Your attention to the above matter would be appreciated.

Sincerely yours,

Richard Switlik

RS:jcw

Enclosures

March 15, 1974

Mr. Russell A. Cookingham, Director
Division of Fish, Game and Shell Fisheries
State of New Jersey
Department of Environmental Protection
P.O. Box 1809
Trenton, New Jersey 08625

Dear Mr. Cookingham:

You will recall in early July 1973 a discussion I had concerning the provision of escape corridors for wildlife between the state owned hunting grounds south of Reed Road and the low lying watershed surrounding Switlik Lake and the Prospertown State Lake. It was your suggestion, per letter attached, that a 100 foot corridor be provided at intervals. This suggestion was not incorporated at the local township level.

Attached is a photograph of the actual impact of a completely fenced in area, the animal safari park. A close examination of the deer may indicate it was gutted in its attempt to jump the fence. Although the deer lay in a lawnlike pasture area within the animal park, three days later it had not yet been removed.

I think that your office, in the interest of wildlife and by virtue of the fact that the State of New Jersey has fish and game holdings on either side of the animal safari park, should insist on these escape corridors.

Sincerely yours,

Richard Switlik

RS:jj

Enclosures

March 15, 1974

Mr. Alfred Guido
State of New Jersey
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

Dear Mr. Guido:

With further regard to the environmental impact study of Great Adventure, I make the following comments:

Informational Bulletin No. 1, issued by your office, set out certain guidelines. Paragraph A, Section 2, subparagraph B, requires the probable impact of the proposed projects on the environment including impact on ecological systems such as wildlife, etc. I met with Mr. Russell Cookingham in early July 1973 and requested escape corridors be provided for wildlife since south of the animal safari are located state owned hunting lands where the wildlife in the area must have access to the watershed of Switlik Lake and the Prospertown State Lake. The deer have used these low lying swamp areas for refuge unless the corridors are provided.

Attached is a letter from Mr. Cookingham dated July 16, 1973, pertaining to this matter. You will note that Mr. Cookingham anticipated that the deer "might very well throw themselves against the iron fence."

Attached also is a photograph taken on March 4, 1974, of the impact on the domestic deer. You will note that the deer was probably gutted when it failed to clear the safari enclosure. Late in the evening of March 7 this deer had yet not been removed even though it was only 50 yards from another animal enclosure lying on a lawnlike pasture ground.

Your consideration of the impact on the wildlife will be appreciated.

Sincerely yours,

Richard Switlik

RS:jj

Enclosures

Mr. Alfred Guido March 14, 1974
State of New Jersey
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

Dear Mr. Guido:

Your letter of March 12 states that you are primarily concerned with noise and air pollution.

I understand that information has been sent by other interested parties to Dr. Kimble Widmer, Chief of Bureau of Geology and Topography, Division of Water Resources. As I understand, the problems of Great Adventure in the areas of water pollution and sewage are monumental. No doubt your omission of these matters in your March 12 letter was an oversight.

We agree that deed restrictions are the primary concern of the buyer and seller, but we also feel that deed restrictions must be considered by the State Department of Environmental Protection or they place themselves in the position of being a party to the breaking of these restrictions.

Your letter mentions your concern for noise, and we again point out that the noise from the amusement park generated from "Runaway Train, Flume Ride," etc., would be incompatible with the area and also with the drive through animal park. As Great Adventure stated that a hovering helicopter at the legal altitude and beyond the boundary line did frighten those animals and "as a result thereof several animals were injured," based on their statements it is imperative that the State consider the noise impact not only on the surrounding area but also on the other areas of Great Adventure.

Sincerely yours,

Richard Switlik

March 8, 1974

Mr. Alfred Guido
State of New Jersey
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

Dear Mr. Guido:

In addition to drainage into the Switlik Lake which has been mentioned in previous correspondence to you, I point out that Great Adventure cannot meet State requirements pertaining to projected noise levels from their amusements.

It is believed that the State requirements are for noise levels at a property line and not at a point which an adjacent owner chooses to build. If they are permitted to generate the noise levels as per page 52 of the February 19th environmental impact report, all the land in the immediate area still in a residential category would be unuseable. The noises generated by Great Adventure's amusement section are an infringement on the rights of the adjacent property owners.

Additionally, no concern is given to noise impact on the fenced wild animals who cannot flee as can local domestic animals when they are frightened by noises.

In a recent letter to me you stated that in the near future you would arrange a conference with me. Please be advised that I am still available for this conference.

Sincerely yours,

Richard Switlik

R.S.: jcw

cc: Jackson Township Committee
Mr. Jack Tractenburg,
Jackson Township Conservation Committee
Upper Freehold Township Committee
Upper Freehold Township Conservation Committee

March 7, 1984

Jackson Township Committee
Jackson, New Jersey 08527

Gentlemen:

The March 7 issue of the Messenger-Press stated that Mr. Richard Weston, Senior Vice President of Hardwicke, appeared before the Millstone Township Committee and when questioned about the company's proposed use of Switlik Lake stated that "the company owned a small part of the shoreline, but that it had riparian rights to use the lake itself."

This statement is based on lack of knowledge on Mr. Weston's part, misinformation, or being misquoted. It is interesting to note that Mr. Fred Becker, a licensed New Jersey attorney, did not make the statement since he knows better with respect to any rights to Switlik Lake or "riparian rights" on non-tidal waters in the State of New Jersey.

For further clarification and documentation, enclosed is a copy of the deed given to Hardwicke on June 21st for the small portion of Switlik Lake. This portion amounts to two acres out of thirty-five to forty acres and is located at the upper reaches of the lake.

Note the following paragraphs of the deed:

(1) "That the said lands, premises and lake hereby conveyed will not be polluted by man, animal or machine, but may be utilized by aquatic birds."

(2) "The grantees, successors and assigns shall and will comply with all applicable federal, state, and municipal statutes, rules, and regulations including those of the Department of Environmental Protection of the State of New Jersey relating to pollution of the lands and waters herein conveyed."

(3) "The conveyance herein shall in no way be construed to convey or grant any rights to the grantees, successors, and assigns to utilize any portion of Switlik Lake not hereby conveyed."

(Note that Hardwicke has no right to utilize *any* portion of Switlik Lake not hereby conveyed.)

(4) "No water may be drawn from the lake herein conveyed or diverted, tapped, either by tunneling, digging or dredging, except for emergency fire purposes, nor shall grantees, successors or assigns alter the shore land of the lake herein conveyed in any way. Shore lands as referred to in this description shall mean shore lands as the same existed on January 1, 1973, at which time Switlik Lake had an elevation 106.4 feet and Prospertown State Lake had an elevation 102 feet."

Schedule A, page 44, of the Deed of Conveyance for some of the other lands surrounding Switlik Lake contains the following: "No portion of the waters of Switlik Lake shall be diverted, tapped or used in any way by Grantee, including without limitation, by tunnelling, digging or dredging, nor shall Grantee alter the shoreline of said Lake in any way."

In the last paragraph on page 44 of the deed is the following: "For purposes of defining the 'shoreline' of the lake, the boundary is to be at a point where the water adjoins the uplands as opposed to 'grassline'."

It would be interesting to find where Hardwicke contends they have any rights beyond those quoted above.

The environmental impact study dated February 19, 1974, furnished to New Jersey and yet not acted upon has the following on page 29: "The run-off from the Theme Park area will flow to the neck of Switlik Lake." "In the event that the maintenance program is inadequate to control the surface litter from gaining access to

Switlik Lake, then the following contingency plan will be implemented to resolve the problem: The placement of screening in the various catch basins around the Theme Park site to catch surface litter before it enters the drainage system; or, the use of fine mesh screening across the neck of Great Adventure's portion of Switlik Lake to retain debris. The debris would then be removed on a periodic basis to avoid unsightly conditions."

Page 31 of the report states: "Should eutrophic conditions develop (i.e., coliform counts in excess of 24 per 100 mil, *fecal* coliform counts in excess of 200 per 100 mil, or significantly raised levels of nutrient)the following contingency plan will be instituted: Drying up all streams during the dry weather flow periods by means of perforated agricultural tile to prevent animals from gaining access to flowing steams; or, piping of the streams."

How do the above mentioned paragraphs in the environmental impact report tie in with the deed requirement that the lake cannot be polluted or used in any way?

Page 32 of the environmental impact report states: "Surface water diversions will consist of the withdrawal of irrigation water for Lahaway Creek. Lahaway Creek presently does not require a diversion permit for this purpose. The estimated amount of water to be diverted is on the order of 200,000 gpd when available."

How does Great Adventure intend doing this when, again, the deed states the waters of the Switlik Lake shall not be diverted, tapped or used in any way by the Grantee? As people in the area know, the amount of water flowing over the dam of the Prospertown State Lake in the summer is almost marginal, and the withdrawal of any water would make the Switlik Lake and the Prospertown Lake similar to the lake located in the borough of Allentown with which all the residents of the area are quite familiar.

If your good offices require any other information or documentation, please do not hesitate to call.

Sincerely yours,

Richard Switlik

RS:jcw

Enclosures

January 3, 1974

State of New Jersey
Department of Environmental Protection
P. O. Box 1390
Trenton, New Jersey 08625

Attention: Mr. A. Guido

Subject: Great Adventure Impact Study
Acoustical Report

Gentlemen:

Attached is a copy of Informational Bulletin Number 1 issued by the commissioner of the Department of Environmental Protection.

Paragraph A, Section 2, sub-paragraph c requires an assessment of the adverse environmental effects with regard to noise. The bulletin also requires a statement as to alternatives to the proposed project which would eliminate or minimize any adverse effects.

We take the position that the amusement park, not to be confused with the drive-in animal section, is contrary to the use permitted under the deed of conveyance. However, the comments being made in this letter are not to be construed as acquiescence of the amusement park.

Originally when the Jackson Township Zoning Board of Adjustment approved the project, and old fashioned fairgrounds and arena area were located 2600 feet from any body of water. You will note that in the initial environmental reports submitted to your office, namely those dated June 5, there was no mention of an amusement park. In a letter from the Elson T. Killam Associates dated May 1, 1973, listed in Statement on Environmental Protection as Appendix D, Page 1, is stated, "In addition to the drive-through animal area, auxiliary attractions will be included which will be *limited* to short order and snack-type refreshment stands, souvenir booths and a picnic area."

All the data this far submitted as Appendix D, which pertain to sewage, percolationtests, and sub-surface water conditions, only pertained to the animal portion.

Page 16 of Appendix D states that in 1984 they anticipate 1,000,000 to 1,500,000 persons in attendance. The daily sewage flow was based on this attendance. Great Adventure also anticipated, per Page 16, 100 employees.

Since the submission of this impact report, Great Adventure is proposing a huge amusement park which, according to representations before the Jackson Township Planning Board, is now necessary to draw in substantial numbers of additional persons. Their new projection is 2,000,000 people, or double the number of persons estimated in the impact studies submitted to your department. The number of employees on Page 16 is listed as 100, whereas their latest announced number is 800 to 1,000.

In view of Commissioner Sullivan's requirement of an acoustical study we secured the services of an acoustical engineer to examine Hardwicke's impact report. The Brown-Guernsey comments attached are not an acoustical study, but rather a critique as to the information which Hardwicke should supply to meet Commissioner Sullivan's requirements.

Attached also is a copy of a deed for certain portions of water from Stanley Switlik to Hardwicke. You will note in this deed on Page 2, paragraphs 1 and 2, there are certain covenants pertaining to pollution, one of which states that they will comply with "regulations including those of the Department of Environmental Protection of the State of New Jersey relating to pollution of the lands and waters herein conveyed."

The comments made above are not all inclusive, and I would appreciate the opportunity of discussing our position in a conference with either you or members of your staff.

Sincerely yours,

Richard Switlik

RS:jcw

Enclosures

EXHIBIT "D"

Letters to Richard Switlik from State Agencies.

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

April 1, 1974

Mr. Stanley Switlik
1325 East State Street
Trenton, N. J. 08619

Dear Mr. Switlik:

Thank you for your letter of March 15 relative to the discussion we had in July 1973 concerning the escape corridor at Great Adventure, also thank you for the photo of the deer.

I was of the opinion in our discussion in July concerning the 50 to 100 ft. corridor that we were going to work with Great Adventure in this development. Possibly this could be called to their attention as it is practical at this time.

Regarding the picture, I am informed by my biologist that a pack of wild dogs chased it into the fence and the deer was partially eaten. My biologist instructed that this deer should be buried as quickly as possible.

We would be happy to discuss this escape corridor at greater length in the near future.

Very truly yours,

/s/ Russell A. Cookingham
RUSSELL A. COOKINGHAM
Director

RAC/PDM

amo

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007**

January 21, 1974

Mr. Richard Switlik
Switlik Parachute Company, Inc.
1325 East State Street
Trenton, New Jersey 08607

Dear Mr. Switlik:

I am writing in response to your December 11 letter, concerning the proposed Great Adventure amusement park for Ocean County, New Jersey. To my knowledge, there is no Federal participation in the construction of the amusement park. Therefore, an environmental impact statement on the park development is not required pursuant to Section 102(c) of the National Environmental Policy Act (NEPA).

Regarding the widening of highways with Federal funds in the area of the proposed amusement park, it is the Federal Highway Administrator's responsibility to determine the applicability of the NEPA process to such projects. I suggest that you contact Mr. Lloyd Jacobs, New Jersey Division, Federal Highway Administration, Suburban Square Building, 25 Scotch Road (2nd Floor), Trenton, New Jersey 08628, for further information on their role in the anticipated road construction projects.

Since this project has apparently received approval from the local level of government, you should contact New Jersey's Dept. of Environmental Protection (DEP), P.O. Box 139, Trenton, New Jersey 08625, to determine if any approvals are required on their part. Mr. Al Guido is in charge of the office that reviews the environmental impact of projects that fall within the province of an executive order issued by the Governor in October of 1973 requiring such reviews, and should be able to answer any questions you have. The State DEP should be the first level of government involved in a review of the environmental effects of this project.

Your interest in protecting the environment is appreciated.

Sincerely yours,

/s/ Eric B. Outwater
ERIC B. OUTWATER
Deputy Regional Administrator

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TRENTON 08625

January 8, 1974

Mr. Richard Switlik
Switlik Parachute Co.
1325 East State Street
Trenton, N.J. 08607

Dear Mr. Switlik:

This will acknowledge receipt of your correspondence and documentation of January 3, 1974 concerning the proposed Great Adventure project.

Our concern over the "amusement park" complex is such that I have scheduled a meeting with the principles of the company for this week. "The drive through safari park operation" has been the subject of Departmental involvement for some time and the applicant is presently holding discussions with our technical people on the permits, i.e., waste water treatment, etc., which are required.

I will be contacting you within the next week or ten days to set up a conference as per your suggestion.

You may be assured of our continued interest and concern on this project.

Sincerely yours,

/s/ Alfred T. Guido, Chief
ALFRED T. GUIDO, CHIEF
Office of Environmental Review

ATG:cs

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER RESOURCES
TRENTON, NEW JERSEY 08625

August 1, 1973

Mr. Richard Switlik
Switlik Parachute Company, Inc.
1325 East State Street
Trenton, New Jersey 08607

Der Mr. Switlik:

Re: Proposed Safari Park
Township of Jackson

This is in response to your letter of July 20, 1973 enclosing copies of existing water quality data prepared by Lanning Engineering Company, excerpts from deed of transfer and deed of covenants, and other related material.

The conceptual proposal and environmental impact material are being reviewed by the various responsible Bureaus within the Department of Environmental Protection. We anticipate that the Department will require that many aspects of the proposal be clarified and that additional supportive documentation be submitted. We will retain the material you have submitted with the total file for further consideration.

Very truly yours,

/s/ Douglas M. Clark
DOUGLAS M. CLARK
Supervising Environmental Engineer

6E18:G4
cc: Mr. Guido, Commisioner's Office (w/enclosure)
Mr. Nerlick

TOWNSHIP OF JACKSON
MUNICIPAL BUILDING - R.D. 4, BOX 52
Jackson, New Jersey 08527

August 30, 1973

Mr. Stanley Switlik
c/o Switlik Parachute Co., Inc.
P.O. Box 1328
Trenton, New Jersey 08607

Re: *Great Adventure - Hardwycke*

Dear Mr. Switlik:

Thank you for your letter of August 28 concerning the above and more particularly for the map dated July 1972, upon which presumably the Township Committee gave their consent. I have feared from the outset undue emphasis would be placed upon the amusement area and we would wind up with 70% Coney Island and 30% animals. To review the applicable ordinance, I conclude that this is not a reasonable fear because of certain limitations fixed defining the amount of ground cover a particular activity can enjoy.

I thank you for bringing your points to our attention and rest assured that the actions of the planning board will be directed toward the safety and preservation of our natural environment and for what is most advantageous for the general citizen of Jackson Township.

Very truly yours,

/s/ Raymond F. Shea, Jr.
RAYMOND F. SHEA, JR.

RFS:lr

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

July 24, 1973

Mr. Richard Switlik
Switlik Parachute Company, Inc.
1325 East State Street
Trenton, New Jersey 08607

Dear Mr. Switlik:

This will acknowledge your letter of July 19, 1973, with the copy of the Jackson Township Resolution dated December 29, 1972.

I agree with your position and I shall work with Director Russell A. Cookingham and other State officials to protect the State's interest.

Sincerely,

/s/ Joseph J. Truncer
JOSEPH J. TRUNCER
Director

JJT:npg

cc: Director Russell A. Cookingham
Frank H. Rigg

EXHIBIT "E"

OPINION OF THE HONORABLE ROBERT H. DOHERTY, JR., SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, JULY 14, 1976, ON LIABILITY

Not for Publication without the Approval of the Committee on Opinions

OCEAN COUNTY COURT

Chambers of Robert H. Doherty, Jr.
Judge

COURT HOUSE
TOMS RIVER, NEW JERSEY
08753

July 14, 1976

LETTER OPINION

E. John Wherry, Jr., Esq.
340 West State Street
Trenton, New Jersey 08618

Frederick Becker, Esq.
Wilentz, Goldman and Spitzer
252 Madison Avenue
Perth Amboy, New Jersey 08861

Re: Stanley Switlik and Wanda Switlik vs.
The Hardwicke Corporation, et al—
Hardwicke Companies Incorporated,
et al vs. Richard Switlik
Docket No. C-371-73

Gentlemen:

This letter opinion will concern itself with the liability of Richard Switlik to Hardwicke Companies, Inc. and others hereinafter referred to as Hardwicke on three (3) separate theories and the liability of Stanley Switlik to Hardwicke on one (1) theory. These theories are as follows:

1. Interference with Hardwicke's Contractual Relations

2. Interference with Prospective Economic Advantage of Hardwicke

3. Fraudulant Conduct - This theory is the single theory against Stanley Switlik.

INTERFERENCE WITH HARDWICKE'S CONTRACTUAL RELATIONS

I find the following facts:

Richard Switlik advised Hardwicke that title would not close in accordance with the contract unless a certain boundary line was relocated. At this time he believed there was no ambiguity in the contract as to the location of this line between the property conveyed and that reserved by his parents. He did not consult with his parents prior to this action.

I find that he prevailed upon and encouraged Scott Bailey, an officer of the Girl Scout Council which owned land adjoining the premises in question, to oppose a necessary zoning variance before the Jackson Township Board of Adjustment. His purpose was to assure objection and yet not do so openly, since his father was bound by the contract in question to cooperate in obtaining the variance.

Richard Switlik further insisted that title would not close unless Parcel B of the premises to be conveyed contained a restriction against permitting wild animals thereon. There was no such restriction in the contract.

He further insisted on a specific location for an access road at or near the existing access road although the location of this road was to be negotiated. The clear intention of the parties was to locate the road at a place other than the existing access road. This road was clearly delineated on the map attached to the contract and its location would not ordinarily have to be negotiated.

He further insisted that the conveyance omit the neck of Switlik Lake although its conveyance was contemplated by the parties. This is evidenced by the addition of $100,000 to the contract price before the contract was signed. Judge Addison found, at the earlier trial of a different aspect of this case, that there was no common understanding with respect to the location of the boundary line.

Richard Switlik's above referred to understanding that there was no ambiguity remains important in determining his frame of mind in insisting on the changes in the contract. I find that these demands resulted in many concessions by Hardwicke in order to accomplish the settlement of the specific performance action. This settlement was forced upon Hardwicke by the elements of economic duress outlined in the testimony by Hardwicke officers.

I conclude that the above activities of Richard Switlik interfered with the Hardwicke contract and were wrongful, without justification, and amounted to legal malice. These acts were intentionally detrimental to Hardwicke and potentially beneficial to Richard Switlik, the only son of the vendors. Under this theory Richard Switlik is liable to Hardwicke.

INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE OF HARDWICKE

I find the following facts:

Richard Switlik participated in a fraud against Hardwicke as will be referred to hereinafter. He made numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities both before and after the title to the property was conveyed. He persisted in claiming that his father had access through the original access road even after the settlement of this claim. He purchased the "Seelig Property" for at least the partial purpose of being in a position, as a neighbor, to make complaints through an alleged trustee. The complaints reinforced his own complaints against Hardwicke. He did not disclose his interest in this property. He participated in the financing of a law suit by the Environmental Commission of Upper Freehold, et al, by furnishing at least some of his money to the plaintiffs for legal expenses. He caused twenty (20) tons of sand to be dumped in a drainage area to the disadvantage of Hardwicke. He appeared before the Planning Board and spoke out in opposition to the location of an Entertainment Park on the Hardwicke property although he had participated in the settlement leading to the title closing. He knew that this settlement specifically contemplated such a park. The above activities interfered with and were detrimental to Hardwicke's economic position.

I conclude that many of the above activities taken separately would not be wrongful. Taken together they satisfy me of Richard Switlik's malicious motivations in undertaking them. I find therefore that Richard Switlik is liable to Hardwicke on this theory.

FRAUD

Judge Addison found plaintiffs guilty of fraud and Richard Switlik contends that it is not clear which of the plaintiffs were included in this finding. I find that Richard Switlik knew that Parcel 10C belonged to his father at the time the contract was being negotiated. He attempted to get the boundary line in question moved to connect with Parcel 10C. He joined with his father in misrepresenting the ownership of this parcel to be in the State of New Jersey. This was to the disadvantage of Hardwicke and prospectively to his advantage.

I conclude that Richard Switlik precipitated a fraud against Hardwicke and is liable therefor. Stanley Switlik has been found to be so liable by Judge Addison and I conclude from my own evaluation of the testimony that he is liable.

An Order may be presented in accordance with this opinion.

Very truly yours,

/s/ Robert H. Doherty, Jr.
ROBERT H. DOHERTY, JR.,
J.C.C. t/a

RHDjr/abw/m

EXHIBIT "F"

OPINION OF THE HONORABLE ROBERT H. DOHERTY, JR., SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, AUGUST 26, 1977, ON DAMAGES

LETTER OPINION

E. John Wherry, Jr. Esq.
340 West State Street
Trenton, New Jersey 08618

Frederick Becker, Esq.
Wilentz, Goldman and Spitzer
252 Madison Avenue
Perth Amboy, New Jersey 08861

RE: STANLEY SWITLIK and WANDA SWITLIK v. THE HARDWICKE CORPORATION et al
HARDWICKE COMPANIES, INCORPORATED v. RICHARD SWITLIK

DOCKET NO. C-371-73

Gentlemen:

On July 14, 1976, this Court found that Stanley Switlik and Richard Switlik must respond in damages to Hardwicke's New Jersey Preserves, Inc ("Preserves"), Hardwicke Companies Incorporated ("Hardwicke"), and Great Adventure, Inc. ("Great Adventure"), together referred to as the Hardwicke interests. (See my Letter Opinion of that date) Since these findings included a finding that the Switliks had participated in a fraud and that Richard Switlik had acted maliciously, a further hearing was had to determine not only the amount of compensatory damages which should be awarded, but what exemplary or punitive damages are appropriate. This Letter Opinion concerns itself with the above referred to damage questions.

I shall first analyze the claims, then set forth my findings and finally award damages.

CLAIMS

1. Preserves claims compensatory and punitive damages against Richard Switlik for malicious interference with Preserves contractual relations with his parents, Stanley Switlik and Wanda Switlik, alleging that it was forced to renegotiate this enforceable contract for the sale of real estate because of economic pressure. This caused the loss of the use of large portions of the premises to be conveyed and the payment of an additional $100,000 in the purchase price. Preserve additionally seeks reimbursement for other expenses, including legal fees, which it alleges were incurred and will be incurred as a result of Richard Switlik's malicious interference with Preserves prospective economic advantage. It also seeks punative damages in this connection.

2. Great Adventure seeks compensatory and punitive damages against Richard Switlik arising out of a delay in the closing of the above referred to real estate contract, which delay arose out of the malicious interference of Richard Switlik. Great Adventure also seeks compensatory and punitive damages against Richard Switlik and Stanely Switlik arising out of a later and distinctly different delay brought about by the Switlik's fraudulent claim of ownership of a parcel of land which would effectively cut the premises in question approximately in two. Considerable testimony was heard concerning the effect of these delays in increasing the construction costs of the entertainment park and the loss of revenue arising out of the delayed opening of the park.

3. Hardwicke claims compensatory and punitive damages against both Richard Switlik and Stanley Switlik alleging that their malicious interference with its prospective economic expectancy resulted in a forced sale

of its subsidiaries for an amount considerably under the fair value of these subsidiaries.

FACTS AND CONCLUSIONS

The Court finds the following facts and legal conclusions with respect to these claims:

Preserves was forced to close title under another agreement because it was economically necessary to commence work and have the amusement park open at the earliest possible time. The malicious interference of Richard Switlik with the contractual rights of Preserves and his interference with its prospective economic expectancy forced Preserves to abandon many of its rights under its May 1972 contract to purchase the site of the amusement part and to concede the loss of the use of a considerable portion of the land to be conveyed thereunder and further to pay additional money for rights which they already had under the contract. This interference also occasioned extra legal expenses to defend suits intended and fostered by Richard Switlik to delay Preserves.

I further find that the Hardwicke interests had planned at or about the time they entered the May 1972 contract, to construct both a Safari Park and Theme Park as part of an amusement park to be open for the Spring season of 1974. This would have been accomplished but for the malicious interference of Richard Switlik in wrongfully delaying the title closing from at least May 21, 1973 to late July, 1973, combined with the Parcel 10C fraud of both Switliks. The Switliks knew that this delay would inflict great hardship and severe financial strain on the Hardwicke interests which in fact it did. I do not believe that the Theme Park was to be constructed for a later season and find that the contract for that Park was to begin by October 1973 when the heavy construction in the Safari Park was under way. It follows therefore that the expenses and losses occasioned by the delays are an appropriate part of any damage awarded to Great Adventure, as is the loss of the economic advantages to which Preserves were entitled under the contract of May 1972, which advantages they were forced to abandon by the tactics which delayed the closing under that contract.

As noted above, I found that there was a second delay occasioned by the fraudulent assertion of ownership of Parcel 10-C by Stanley Switlik and participated in by Richard Switlik. This delay was calculated to and did impose further burdens on the Hardwicke interests.

As to the Hardwicke's claim for damages arising out of the sale of its subsidiaries to New Adventure, Inc., the Court has considered the testimony of Mr. Thorson and Mr. Whitman as well as that of Mr. Perkins. In considering the projection and opinions of Mr. Whitman, it should be noted that although he places the construction cost increase occasioned by the second delay at $13,968,000, I have not accepted this figure as will be discussed later in this letter. It is agreed that the sale took place at a time when the economy in general was depressed and spending money for leisure time was restricted as was motor fuel availability. The Court is not persuaded by the greater weight of the credible evidence that the sale was in fact forced or that it was for less than fair market value. The Court therefore can make no award for damages based on this claim.

COMPENSATORY DAMAGES

I shall now proceed to assess such damages as I find are the natural and proximate consequences of the acts of the respective Switliks. I do not find it necessary to apply a more liberal rule in determining the consequences for which malicious tortfeasors are reasponsible, and I have not done so in assessing compensatory damages here.

1. As to Preserve's claims against Richard Switlik for the loss of the benefits it had under the land purchase contract, I award $100,000 for the loss of the lake area which I find from the testimony and exhibits should have been conveyed under the May 1972 contract; $407,303 for the loss of the use of the 155 acre tract which is arrived at by estimating the taxes and interest for the ten year period during which its use will be lost and $28,300 for the paving of the access way. I am not satisfied by the greater weight of the evidence as to what the loss might be, if any, in connection with the claim for the cost of an overpass or the cutback of the Safari road or the additional engineering and surveying expenses referred to by Preserve's, and I therefore make no award for those claims. In addition to the above, Preserve's was subjected to legal costs in connection with the delayed closings, forced settlement negotiations and the necessity for a specific performance suit in the amount of $65,500. I also award $16,244 in legal expenses for defending the Seelig suit which was precipitated wrongfully by Richard Switlik. Preserve's claims an additional $238,000 for legal fees in connection with the trial of the first aspect of this suit before Judge Addison, which legal fees I decline to consider since they were incurred in the same action in which this is the judgment. Therefore, I award Preserve's $617,347 in compensatory damages against Richard Switlik.

2. As to Great Adventure's claim against Richard Switlik arising out of the first delay, I find the following damages would have occured even if there had been no second delay and will make an award accordingly: $28,791 for increased costs of roadway, $7,557 for maintaining incomplete roadways during winter, $364,937 additional expenses for animal structures after giving credit of $214,813 projected expenses for Umbaugh housing, and $1,605 costs of temporary zebra

housing. These figures were testified to by Mr. Lapins and Mr. Nielsen, which testimony I found to be creditable and persuasive. I further find that the costs of defending the environmental suit should be assessed against Richard Switlik in the amount of $72,896, since Richard Switlik wrongfully participated in the financing of this lawsuit. Therefore, I find in favor of Great Adventure and against Richard Switlik on this claim in the amount of $475,786 as compensatory damages.

3.(a) As to the claim of Great Adventure against Richard Switlik and Stanley Switlik arising out of the second delay caused by the fraud with respect to Parcel 10-C, I find the following specific items of damage were suffered by Great Adventure and will enter judgment accordingly: Road costs in the Safari Park were increased by $53,387. It became necessary to rent generators at the cost of $17,860 for heat for the animals in Safari Park. Both these figures were furnished by Mr. Lapins. Additional costs were incurred in connection with the completion of the Theme Park. Mr. Neilsen's testimony concerning this claim was quite lengthy and in great part esoteric, containing graphs constructed through the efforts of many engineers, interpretations, extrapolations, projections, and references to skewed bell curves. Although this testimony was presented painstakingly and in great detail and although I am satisfied that damage was caused by the delay with its ensuing compressed work schedule, I am not persuaded by it and cannot accept Mr. Nielsen's conclusions and award specific damages based thereon. I was however, impressed by a good deal of Mr. Lapin's testimony with respect to specific instances of damages and shall make awards on this claim based on this testimony as buttressed and supplemented by the testimony of Messrs. Nielsen and Ney and other witnesses. Accordingly, I award $40,000 for the extra costs of the bandstand, $50,206 for extra concrete because of inadequate grading for the Theme Park paving, $153,477 additional expenses for supervisory personnel and $2,000,000 for overtime premiums. There was testimony to the effect that the total overtime premiums amounted to $3,500,000. Mr. Lapins testified that as much as ten per cent (10%) of this would have been necessary even without the delay. I am not satisfied that all of these overtime premiums were actually incurred. Mr. Nielson estimated the overtime to amount to approximately $3,000,000 and I was not satisfied that each of the twelve contractors incurred as much overtime as the testimony appeared to indicate. I am further satisfied that a considerable amount of overtime was necessary to satisfy changes which were made by Werner LeRoy not caused by the delay and that there was a natural need for overtime charges in a complex and novel construction project such as the one here. There were premiums for late ordering as a result of the delay in the following amounts: $3,815 glass for merchandise tents, $7,104 for the ice cream parlot, $57,996 for logs for the Teepee and Western Restaurant, $20,000 for larger than necessary steel in the Dolphin Stadium, $15,959 for extra air freight charges for cable car, flume ride and merchandise tent material, $4,000 for an extra M.D.C. feasability study, $51,390 for staging building materials in the parking lot, $6,494 for changes in the water supply pipes, $41,446 for watchman's salary at the water plant, $37,528 expenses in using trial assembly methods for logs in the Western Restaurant, $3,360 for cleaning stains from the Dolphin Pool, $13,360 for repairing breaks in utility lines, $149,690 extra payments for steel occasioned by the delay as testified to by Mr. Lapins, further testified to by Mr. Nielsen.

There was testimony by Messrs. Lapins and Nielsen with respect to losses occasioned by the insufficient time to obtain competitive bids for work on the Ginger Bread and Yum Yum Restaurants and certain electrical roofing and other work. I am not satisfied by the greater weight of the evidence that any loss was occasioned by the failure to use competitive bidding as I was impressed by other testimony that it was not practical to use competitive bidding in any event on a job like this whether or not there were delays in question. There was further testimony concerning certain expenses in connection with the discovery of a quicksand condition in the area of the Western Restaurant. Because of the vagueness of the testimony concerning the discovery of this condition and its location, I am not persuaded by the greater weight of the evidence that this would be an item of damage and make no awards therefore. I therefore find in favor of Great Adventure and against Richard Switlik and Stanley Switlik in the amount of $2,727,012 on its claim for increased construction costs occasioned by the second or fraud delay.

3.(b) Great Adventure has an additional claim against both Switliks for lost operating profits which are claimed for June and the first sixteen (16) days of July, 1974. Although the witness Leone's testimony contained further extrapolation and is subject to some doubts as to its accuracy, being based on figures from another year with its different circumstances with respect to weather, economy, etc., it provided me with sufficient information to satisfy me by the greater weight of the evidence that Great Adventure suffered a loss of at least $1,000,000 during the time in question. I am satisfied that Highway I-195 could have been opened by June 1st, if the Park had been opened on that date. I therefore find in favor of Great Adventure and against Richard Switlik and Stanley Switlik in the amount of $1,000,000 on its claim for lost revenues.

PUNITIVE DAMAGES

There remains the claim of Preserve's, Great Adventure and Hardwicke for punitive damages. In my above referred to letter opinion of July 14, 1976, I referred specifically to my findings as to the acts of the Switliks which I found gave rise to this claim and I shall not repeat them.

I have considered the wealth of Richard Switlik as indicated by the evidence produced. I find that he was the main and driving force in the malicious activities complained of and which I find in fact occurred, and that the damage done was very substantial. Furthermore, it is stipulated that Richard Switlik harbored an intense personal dislike toward some of the principals of the Great Adventure group. However, in resolving the issue of punitive damages, I will consider his financial position as if he has paid the compensatory damages assessed herein. The general theory concerning exemplary damages being to accomplish the purpose of punishment of the wrong done and to deter any further wrong, in the light of the magnitude of the amount of compensatory damages awarded, I will not award any punitive damages to any of the parties.

With respect to the claim for punitive damages against Stanley Switlik, I have considered the evidence concerning his financial condition. I have further considered his age and the influence that Richard Switlik's activities must have had upon Stanley Switlik. He was not the moving party in many of the situations complained of but he participated in the so called 10-C fraud. Again in the light of the magnitude of the compensatory damages, I decline to award any punitive damages to any of the parties against Stanley Switlik.

An order may be presented by the Great Adventure interests in accordance with this Opinion.

Very truly yours,

/s/ Robert H. Doherty, Jr.
ROBERT H. DOHERTY, JR.
J.C.C. t/a

EXHIBIT "G"

APPELLATE DIVISION *PER CURIAM* OPINION MAY 31, 1979

Argued May 1, 1979 Decided May 31, 1979

Before Judges Lora, Michels and Larner.

On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County.

Mr. Theodore L. Abeles argued the cause for plaintiffs-appellants and cross-respondents Stanley Switlik and Wanda Switlik, and additional defendant on counterclaims—appellant and cross-respondent Richard Switlik (Messrs. Lum, Biunno & Tompkins, attorneys; Mr. William B. McGuire, of counsel, Messrs. Joseph A. Hoffman, Dominick A. Mazzagetti, Robert J. Kelly and Edward R. McMahon, on the brief).

Mr. Frederick K. Becker argued the cause for defendants and counterclaim Plaintiffs-Respondents and Cross-Appellants Hardwicke Companies, Incorporated, and Great Adventure, Inc. (successor by merger and change of name to Hardwicke's New Jersey Preserves, Inc., and Great Adventure, Inc.), Messrs. Wilentz, Goldman & Spitzer, attorneys; Mr. Becker, of counsel and on the brief).

PER CURIAM.

Plaintiffs Stanley Switlik and Wanda Switlik and additional defendant on counterclaim Richard Switlik appeal from a judgment for liability and an amended final judgment awarding damages and denying application for new trial of the Chancery Division entered following lengthy separate trials on liability and on damages. Counterclaim plaintiffs Hardwicke Companies, Inc., and Great Adventure, Inc. (successor by merger and change of name to Hardwicke's New Jersey Preserves, Inc., and Great Adventure, Inc.), cross-appeal from so much of the amended final judgment awarding damages and denying application for new trial as it denied (1) The Hardwicke Corporation's recovery of compensatory and punitive damages against Stanley Switlik and Richard Switlik, (2) Hardwicke's New Jersey Preserves, Inc., recovery of a portion of its claimed compensatory damages and all punitive damages against Richard Switlik, and (3) Great Adventure, Inc.'s recovery of punitive damages against Richard Switlik and a portion of its claimed compensatory damages and all punitive damages against Stanley Switlik and Richard Switlik, jointly and severally.

We are entirely satisfied from our review of the voluminous record and the arguments presented in these consolidated appeals that the judgments of the trial court is based on findings of fact which are adequately supported by the evidence; the determination of the trial court on the motion for a new trial does not constitute a manifest denial of justice, and that all issues of law raised are clearly without merit. *R.* 2:11-3(e)(1)(A), (C) and (E).

Accordingly, the judgment for liability and the amended final judgment awarding damages and denying application for new trial are affirmed substantially for the reasons expressed by Judge Doherty in his letter opinions of July 14, 1976 and August 26, 1977.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin
ELIZABTH MCLAUGHLIN
Clerk

EXHIBIT "H"

LETTER FROM FREDERICK J. BECKER, ESQUIRE ON EXECUTION TO LUM, BIUNNO & TOMPKINS, ESQUIRES, MARCH 5, 1980

William B. McGuire, Esq.
Lum, Biunno & Tompkins
550 Broad Street
Newark, New Jersey 07102

Re: Great Adventure Judgment

Dear Bill:

Since there is no longer a stay of execution in effect, demand is hereby made of Stanley Switlik and Richard Switlik for the satisfaction of the judgment.

With respect to the escrow, this means that the period of escrow under subsection 1(c) of the Appellate Division Order of December 30, 1978 has been terminated. With respect to the escrow funds which we jointly control, I propose that we jointly release to Great Adventure, Inc. the balance in each of the two escrow accounts. Kindly sign and return to me the enclosed joint request forms to complete the release of the escrowed funds.

Please advise me of the current status of pledges of Switlik assets made prior to the assignment of such assets to Great Adventure, including pledges to ensure loans by the New Jersey National Bank and the Switlik Parachute Company, as well as any securities pledged with your firm in respect of counsel fees.

Sincerely,

/s/ Frederic K. Becker
FREDERIC K. BECKER

EXHIBIT "I"

LETTER FROM THOMAS J. MUCCIFORI REQUESTING RICHARD SWITLIK TO PICK UP FILES, JUNE 15, 1976

June 15, 1976

Mr. Richard Switlik
Switlik Parachute Company, Inc.
1325 East State Street
Trenton, New Jersey 08607

Dear Dick:

I have come across two voluminous files which you dropped off to me one day containing transcripts of hearings involving the Great Adventure and Planning Board of Jackson Township. I would appreciate it if you would pick them up the next time you are in Toms River since I have no need for them and you perhaps would want to refer to these from time to time. I would mail them to you, but they are so bulky that I thought it would be easier for you to pick up.

Sincerely yours,

/s/ Thomas J. Muccifori
THOMAS J. MUCCIFORI

TJM:jcb

EXHIBIT "J"
LETTER FROM THOMAS J. MUCCIFORI ADVISING STANLEY SWITLIK NOT TO APPEAL OPINION OF THE HONORABLE MARK ADDISON, MAY 23, 1974

May 23, 1974

File 8645
Switlik

Mr. Stanley Switlik
Switlik Parachute Company, Inc.
1325 East State Street
Trenton, New Jersey 08607

Dear Mr. Switlik:

I have your letter of May 16, 1974. By now you have received copies of letters sent by me to the Municipal Utilities Authority, which, I believe, will assist in protecting your position.

I cannot disagree with the suggestions contained in your letter in view of your present thinking. You still have time to maintain an action once the park has been completed if it fails to live up to its expectations, if Hardwick Industries fails to perform in accordance with the contract as to drainage, pollution, etc.

The buffer situation, I believe, should be pursued. It is my understanding that Mr. Stanzione was going to write to the Planning Board, making known your objections, and pointing out to the Planning Board that the Deed upon which Hardwicke relies does not involve Switlik Lake, but it does involve the Prospertown Lake.

Insofar as the compensation for parcel 10C is concerned, I have chatted briefly with Milton Gelzer, and I am sure that the situation can be resolved without an appeal. That is, I am sure that you can secure an additional $5,000.00 for that parcel. I am also of the opinion that there is no problem with the lines drawn by Judge Addison, since you indicated you are willing to accept that, and apparently, Hardwick is willing to compensate you for any additional land. I see no reason why an appeal would have to be taken.

Richard mentioned something about a consolidation map which he had not seen, but I am certain that if these two items are agreeable, that the rest of the case could be resolved without the necessity of an appeal and additional expenditure of attorneys' fees and time on your part. This is something that should be pursued. I would, therefore, suggest to you that you instruct John Wherry to negotiate the question of settlement of the pending appeal matter. Or, if you prefer, I can try to negotiate it for you.

Please let me have your thoughts at your earliest convenience in this respect. I do not feel that under the circumstances and in view of your present inclination, that you should be spending a large sum of money in attorneys' fees, and perhaps, it would be advisable to resolve this as quickly as possible.

Sincerely yours,

LOMELL, MUCCIFORI,
ADLER, KEARNEY &
RAVASCHIERE

/s/ Thomas J. Muccifori
THOMAS J. MUCCIFORI

TJM/vlk

Opposition

No. 81-517

Office - Supreme Court, U.S.
FILED
OCT 15 1981
STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD SWITLIK and STANLEY SWITLIK,

Petitioners,

vs.

HARDWICKE COMPANIES INCORPORATED; GSC/SIX FLAGS CORPORATION; and GREAT ADVENTURE, INC.; and ARTHUR BROWN, Ocean County Sheriff,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Hardwicke Companies
Incorporated; GSC/Six Flags
Corporation;* and *Great
Adventure, Inc.*

(11513)

RESTATED QUESTIONS PRESENTED FOR REVIEW

Whether a claim initially adjudicated in state court and reviewed on direct appeal can subsequently be relitigated by the unsuccessful party in a collateral attack under the Civil Rights Act, 42 U.S.C. § 1983?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-517

RICHARD SWITLIK and STANLEY SWITLIK

Petitioners,

vs.

HARDWICKE COMPANIES INCORPORATED, GSC/SIX
FLAGS CORPORATION, GREAT ADVENTURE, INC.,
and ARTHUR BROWN, Ocean County Sheriff,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court
of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Great Adventure, Inc., Hardwicke Companies Incorporated and GSC/Six Flags Corporation oppose the issuance of a writ of certiorari to review the judgment of the United States

Court of Appeals for the Third Circuit entered in this case on June 8, 1981.*

STATEMENT OF THE CASE

A. Relationship of this Proceeding to Prior Proceedings

Petitioners Stanley Switlik** and Richard Switlik (the "Switliks") ask this Court to review the determination of the United States Court of Appeals for the Third Circuit that the Switliks' challenge under the Civil Rights Act, 42 U.S.C. § 1983, to the enforcement of judgments entered by the Superior Court of New Jersey in their prior litigation with respondents (the "state court judgments") is barred by principles of res judicata and collateral estoppel because the First Amendment ground on which the State Court judgments are attacked (the "protected activities claim") has previously been determined in the state court proceedings where the state court judgments were entered.

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* Respondent Hardwicke Companies Incorporated was the developer of the Great Adventure park and an unsuccessful claimant in the prior state proceedings. GSC/Six Flags Incorporated is the present operator of the Great Adventure park. The affiliations of the respondent corporations are set forth in a prior filing in this proceeding (See Respondents' Appendix 70a-72a). Respondent Arthur Brown is the Ocean County Sheriff charged with the responsibility for enforcement of the state court judgments.

** Stanley Switlik died on March 4, 1981, subsequent to oral argument of the appeal below. As of this date there has been no application made by the Estate of Stanley Switlik to be substituted as a party in these proceedings.

This is the second time the Switliks have made the state court judgments the subject of a petition for certiorari. The first occurred in the October 1979 term, when the Switliks unsuccessfully sought direct review of the state court judgments which they have since sought to collaterally attack in this proceeding, advancing, on both occasions, the same protected activities claim.* The Switliks now suggest, in their attempt to justify review by certiorari under Rule 17, that the determination by the courts below that the renewal of the protected activities claim in this proceeding is barred by res judicata and collateral estoppel, constitutes an important federal question not resolved by this Court.

The state court judgments which the Switliks seek to collaterally attack resulted from a state case involving essentially a common law fraud by both Stanley Switlik and Richard Switlik and the damages which were the consequence of that fraud (damages of $4,912,043 were awarded for fraud), and of Richard Switlik's interference with the contract rights of respondent Great Adventure, Inc. and the damage which resulted therefrom (damages of $1,318,511 were awarded for interference with contract rights). The state case also involved tortious interference by Richard Switlik with Great Adventure's economic expectancy for which relatively little damages in the amount of $117,053 were awarded (Resp. App. 3a-4a).* These claims were asserted by Great Adventure in the state court action which Stanley Switlik and his wife had commenced against it for trespass on land which had allegedly been retained by Stanley Switlik in a sale by him to Great Adventure park in Jackson, New Jersey (Resp. App. 9a-10a).*

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* Switlik v. Hardwicke Corp., 466 U.S. 929 (1980).

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* Respondents' Appendix is referred to as "Resp. App.," the Switliks' Petition is referred to as "Pet.," and the Appendix to the Petition is referred to as "Pet. App."

** Neither the 50-volume trial record of the prior state proceedings nor the record in this matter as contained in the affidavit of Frederic K. Becker sworn to on May 23, 1980

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The prior petition to this Court in the state case unsuccessfully raised the same protected activities claim[illegible]ow

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(Resp. App. 1a-69a) supports certain of the "factual" recitals contained in the Statement of the Case contained in the Petition. For example, the Switliks erroneously characterize the state proceedings as concerned with the ecological impact of the Great Adventure park on the Pine Barrens of New Jersey (Pet. 4), an issue not even raised in those proceedings. In fact, the only environmental claims ever previously raised by the Switliks were raised in a separate lawsuit filed in 1976 for alleged noise pollution which was dismissed for lack of prosecution in 1978. An action was recently commenced in 1981 by the Estate of Stanley Switlik against Great Adventure for alleged noise and water pollution of the lands owned by the Switliks adjoining the Great Adventure park.

Additionally, there is absolutely no support for the contention that the Switliks' "environmental concern" (Pet. 4) led them to engage in the various activities to which Great Adventure referred at the state trial as evidence of Richard Switlik's malicious motivation. To the contrary, the state trial court found that the conduct of Richard Switlik was maliciously motivated for the purpose of harming Great Adventure (Pet. App. 113a), and this factual finding has never been reversed on the subsequent appeals from that determination.

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raised on this petition (Resp. App. 18a, 21a), but there was then no prior adjudication to preclude direct review. As on this petition, both Richard and Stanley Switlik sought review of the state court judgments against them without revealing that their protected activities claim did not even apply to Stanley Switlik, since the allegedly "protected activities" were unrelated to the judgment against him for fraud which was based upon a prior adjudication by a different judge at a prior trial in the state case at which the alleged protected activities were not even involved (Resp. App. 10a-11a). As here, Richard Switlik failed to disclose on the prior petition that the protected

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The Switliks' reference to a "secret conflict of interest" which was allegedly created when one of their former attorneys subsequently accepted employment with Great Adventure for purposes unconnected with the state court proceedings is similarly unsupported. See p. 10-11n., infra.

activities claim at best related to only one of the three state court judgments against him i.e., the judgment for malicious interference with economic expectancy, and to only $117,000--less than 2%--of the $6,330,554 in state court judgments entered against him. As applied to this case the argument is no less frivolous than it was when certiorari was last denied by this Court.

We submit that the failure to state these key facts, which indicate the relative insignificance of the protected activities claim to the overall case, illustrates that the present petition is but another action in a series of attempts to impede enforcement of the state court judgments which were entered on October 24, 1977.

As found by the District Court and the Court of Appeals below, and as the Switliks admit before this Court (Pet.

7), the same protected activities claim presented here was raised before the state trial court, pressed at all stages of appellate review in the state courts, and urged before this Court on the Switliks' prior petition for a writ of certiorari to review the state court judgments.*

On July 8, 1980, the District Court dismissed the Section 1983 claim contained in Count One of the Complaint, as

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* Indeed, the most telling arguments of all with respect to the degree to which the "protected activity" argument was advanced on appeal are contained in the Switliks' prior petition for certiorari to this Court and their reply memorandum to this Court on that application. Pages 15 to 20 of the Switlik's prior petition (Resp. App. 40a-45a) contained essentially the same arguments now again advanced before this Court; and the sole purpose of the Switliks' reply brief (Resp. App. 46a-61a) on the prior petition was to urge, in response to Great Adventure's position that the protected activities claim had played a relatively minimal role in the appeal prior to the petition, that this argument "was indeed raised" in the Appellate Division (Resp.

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barred by res judicata and collateral estoppel. Count Two of the Complaint, which asserted a common law claim of alleged interference by Great Adventure with the Switliks' prospective economic advantage based upon Great Adventure's hiring of an attorney who had once represented the Switliks to handle matters unrelated to the state court case, was dismissed for lack of subject matter jurisdiction due to the absence of diversity between the parties.*

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App. 49a), and was "squarely before" the New Jersey Supreme Court both on the petition to that Court for certification and the motion for reconsideration of the denial of certification (Resp. App. 50a).

* Contrary to the assertion that the Court of Appeals "erroneously failed to relate the Count Two allegations (conflict of interest of Petitioners' attorney) to its determination of 'full and fair opportunity' to litigate" (Pet. 7n.), such an argument was never advanced to either the District Court or the Court of Appeals. Nor should it have been, since the allegations of Count Two were

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On June 8, 1981 the Court of Appeals affirmed the District Court's application of res judicata and collateral estoppel in granting summary judgment in favor of Great Adventure on the Section 1983 claim.*

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never the basis for an attack on the enforcement of the state court judgments, nor were any proofs presented on these allegations which are wholly unrelated to the protected activities claim. Indeed, the dismissal of this claim was not even briefed on appeal or raised in oral argument to the Court of Appeals. Accordingly, the suggestions in the Petition that there exists a relationship between the state court proceedings and the unfounded and unproved assertions of Count Two (Pet. 5, 9, 10-11), all of which are made for the first time in this Court and have no support in the record, should not be considered by this Court.

* The Court of Appeals found that there existed no genuine issue of fact material to the question whether the action was barred by principles of res judicata and collateral estoppel (Pet. App. 12a), and that the sole question was a matter of law which the District Court properly decided in view of the prior state court litigation of the protected activities claim (Pet. App. 12a-15a).

B. The State Court Proceedings

i. Interference With Contract by Richard Switlik

In 1972 Stanley and Wanda Switlik contracted to sell a substantial portion of their property in Jackson Township, New Jersey to Great Adventure. Richard Switlik, their son, engaged in acts of interference with that contract. The eventual closing of title resulted only after Great Adventure was forced in 1973 to bring a specific performance action because Stanley and Wanda Switlik refused to honor the contract of sale. That specific performance suit was settled in the summer of 1973 by a closing of title on terms unfavorable to Great Adventure in order to avoid further delay. The reduced benefits so received resulted in substantial damages to Great Adventure which had proceeded with its development efforts in reliance on the terms of the original contract. These damages were awarded to Great Adventure in connection with the finding of Richard Switlik's liability for malicious interference with Great Adventure's contractual relations. (Pet. App. 3a, 111a-112a, 119a-120a; Resp. App. 5a-6a, 13a). None of Richard Switlik's acts of interference with contract include, or relate in any way to, the allegedly "protected activities" involved in this action.

ii. The Lot 10C Fraud of Stanley and Richard Switlik

The fraud related to a triangular-shaped parcel of land called Lot 10C. Prior to the sale, Stanley Switlik and his son Richard Switlik, had represented Lot 10C as not being owned by Stanley Switlik but rather as having been conveyed by Stanley Switlik to the State of New Jersey years before. Great Adventure was taking steps to obtain title from the State of New Jersey. Unknown to Great Adventure, while the deed conveying the Switlik lands to Great Adventure was still in escrow pending the completion of the closing of title, Richard Switlik obtained and caused to be recorded an acknowledgment from the State of his father's "ownership" of Lot 10C in the form of a "corrected deed." Shortly after the sale was complete, Stanley Switlik announced that he was the owner of Lot 10C (Resp. App. 6a-7a).

Because of its location, the ownership of Lot 10C by a party hostile to development of the park would have prevented the park from being built. The sudden post-closing claim of Stanley Switlik to ownership of Lot 10C, therefore, forced Great Adventure to hold back construction of the most costly portion of the park until the Lot 10C problem was resolved, resulting in substantial damage in the form of increased construction costs and lost profits (Pet. App. 4a; Resp. App. 7a-8a). These damages were awarded to Great Adventure in connection with the finding that both Stanley Switlik and Richard Switlik had defrauded Great Adventure (Pet. App. 120a-122a). The finding of Stanley Switlik's fraud had been already been made in the first trial of the state court proceedings, before a different judge, in which the allegedly "protected activities" were not an issue and not even in evidence. As to both Switliks, none of their conduct constituting the Lot 10C fraud relates in any way to the allegedly "protected activities" involved in this action.

iii. Interference With Prospective Economic Advantage by Richard Switlik

Liability for malicious interference with Great Adventure's prospective economic advantage was based on efforts by Richard Switlik to impede construction by Great Adventure with the intent to maliciously injure Great Adventure. The acts committed by Richard Switlik and proved at trial, included his:

(a) personally pulling of survey stakes at night;

(b) causing 20 tons of sand to be dumped in a drainage ditch;

(c) arranging financing of a lawsuit by neighboring municipalities attacking Great Adventure's municipal approvals ultimately dismissed by summary judgment (the "Upper Freehold suit");

(d) attempting, immediately after the closing of title on the land sale, to cause the New Jersey Fish and Game Commission to prevent fencing of the animal park by declaring a deer run across the park thereby attempting to cause the park to be bifurcated;

(e) purchasing land in the name of a nominee, at the same time the sale to Great Adventure was being closed, for the purpose of bringing a legal proceeding (the "Seelig suit") ostensibly by a "landlocked" third party seeking an injunction to open an allegedly public stage coach road across the park; and

(f) claiming after the closing of title on the land sale that his father had retained a third accessway, not provided by the contract of sale, namely the pre-existing access road which had not been granted by Great Adventure at the closing, and which claim represented yet another effort to bifurcate the park. That claim was the subject of a counterclaim heard in the first of the three state court trials and resulted in a judicial declaration of the absence of any such additional access road (Resp. App. 8a-9a).

C. Prior Litigation in State Court of the Specific Issue Raised Here

Only a small portion of the massive state litigation involved the so-called "protected activities" claim raised by Richard Switlik as the basis of his Section 1983 claim in this action. However, commencing with the liability trial, that issue was raised by Richard Switlik at every level of the state case in relation to the counterclaim against him charging interference with the economic advantage of Great Adventure and Hardwicke (Resp. App. 19a).

Pursuant to their counterclaim of malicious interference with economic advantage, Great Adventure and Hardwicke interposed evidence at the liability (second) trial which proved that Richard Switlik's acts of interference with prospective economic advantage, designated above (supra, pp. 15-17), were calculated to impede the development of the park. None of these acts involved complaints to governmental authorities or the exercise of free speech.

To help establish the requisite legal malice for Richard Switlik's acts of interference with economic advantage--one of the elements of the tort--Great Adventure offered, in addition to other proof, the evidence referred to in this action, that Richard Switlik had written 46 letters to various state, municipal and county officials complaining about the park in an effort to delay and impede the park, and had appeared before the Jackson Township Planning Board in opposition to the site plan application for an entertainment park, and had obtained an objecting expert witness to do the same (Resp. App. 20a).*

At the trial, Richard Switlik objected vigorously to the admission of this proof, particularly with respect to the sending of the 46 letters, claiming that this conduct was constitutionally protected protest. As part of his argument, Richard Switlik contended that if the letters were admitted, he would be forced to prove the bases for the complaints reflected therein. In response, Great Adventure said that it did not contend that the protests were without basis and that its offer was so limited (Resp. App. 20a). The Court then accepted the evidence with that limitation.

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* The Switliks additionally mention Richard Switlik's joining with a "citizen's group concerned with protection of the environment" to bring a lawsuit (Pet. 9). Actually, Richard Switlik instigated two lawsuits calculated to enjoin construction of the park, the Upper Freehold suit and the Seelig suit. As to the former, he arranged financing. As to the latter, he purchased certain property adjoining the park through an alleged trustee for the specific purpose of enabling him to challenge the park (Resp. App. 8a-9a).

Several days later, in the course of a different exchange objecting to questions concerning Richard Switlik's motive in requesting the engineer for the municipal planning board to designate an access road claimed by Richard Switlik, the Court indicated that there was nothing "illegal or wrong" about such activity, but that he would have to ". . . hear this at the end of all that testimony . . ." because "it may be one factor that would support some other aspect of the case. . . ."

In addition to objecting to the evidence of his complaints on the ground that they were protected activities, Richard Switlik defended in the state court, arguing that his interference was justified by his status as an adjoining landowner. However, he failed to show that his protests were properly motivated, chiefly because there was nothing in the record to suggest that he was motivated by any interest in adjoining property. Rather, his acts were shown, as asserted by Great Adventure, to be calculated to stop development of the park by any possible means both out of malice and to further his own economic interest.

At the conclusion of the liability trial, the entire case, including the issue of whether the court could consider Richard Switlik's letters and his appearance before the planning board and his arranging of financing for the Upper Freehold suit, was submitted to the court for adjudication without any request by Richard Switlik for further argument or a hearing with respect to the allegedly "protected activities."* Nor did Richard Switlik at any time attempt to reserve the protected activities claim for later determination by a federal court.

In finding liability, the trial court mentioned the letters, Richard Switlik's appearance before the planning board, and his instigation of the Upper Freehold suit as part of the conduct the court considered in ascertaining whether the wrongful conduct was maliciously motivated (Pet. App. 113a). Consistent with the terms of Great Adventure's evidentiary offer and with the statements of the court regarding the offer, the court specifically stated that many of the activities referred to were not wrongful taken separately, but taken together they satisfied the court that there was sufficient proof of malicious motivation to establish liability (Pet. App. 113a). No motion was thereafter made by the Switliks with respect to that finding.

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* In view of this fact, the contention that "the trial court refused to permit the Petitioners to prove the verity of their environmental complaints" (Pet. 6) is another misleading characterization of the events in the state court proceedings.

The following year the damage trial occurred. No damages for Richard Switlik's interference with economic expectancy were imposed for the protests Richard Switlik claimed were protected activity. Damages consisted only of the legal expenses that Great Adventure had been forced to incur in connection with the Seelig suit which Richard Switlik had caused to be commenced by his nominee to open a road through the park ($16,244) (Pet. App. 119) and the Upper Freehold suit which he instigated ($72,896) (Pet. App. 120a).*

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* The damages imposed for this tort were the two referenced amounts which, with prejudgment interest, totalled $117,053.

In proceeding with their state court appeal, the Switliks renewed their protected activity claim in their brief to the Appellate Division, raising the very issue now presented to this Court (Resp. App. 21a, 27a-38a).* The same argument was then submitted to the Supreme Court of New Jersey on two occasions, first on a petition for certification, which was denied, and then on the motion to reargue the denial of certification, which motion was also denied (Resp. App. 18a at ¶ 25). The argument was thereafter submitted to this Court in a petition for certiorari denied April 28, 1980 (Resp. App. 18a at ¶ 26).*

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* In all, a total of five different panels of the Appellate Division were involved in the appellate process of the state case. The decision of the trial court (Hon. Mark Addision) finding Stanley Switlik liable for fraud was unanimously affirmed by an Appellate Division panel consisting of Judges Halpern, Michels and Crane (Resp. App. 10a-11a at ¶ 14). Arguments with respect to the terms of a stay pending appeal of the state court judgments were heard before Appellate Division panels consisting of Judges Conford, Michels and Bilder and Judges Conford, Michels and Pressler (Resp. App. 14a-15a at ¶ 21). The main appeal from the determinations of the trial court (Hon. Robert H. Doherty, Jr.) resulting in the state court judgments was heard and the judgments affirmed by an Appellate Division panel consisting of Judges Lora, Michels and Larner (Resp. App. 17a at ¶ 24). A motion for a new trial was heard and denied by an Appellate Division panel consisting of Judges Michels, Pressler and Bilder (Resp. App. 16a at ¶ 22).

SUMMARY OF REASONS REQUIRING DENIAL OF THE WRIT

This case raises no important questions of Federal law which have not been resolved by this Court. There is neither authority nor logic for not applying the principles of res judicata and collateral estoppel in this case since the claims raised here were fully litigated at all levels of the prior state proceedings, including presentation to this Court on the prior petition for a writ of certiorari which was denied.

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* One month after this Court denied the prior petition for certiorari, the instant proceeding was commenced in the United States District Court with an application to stay enforcement of the state court judgment. The application for a stay was denied and the complaint thereafter dismissed. A subsequent application for a stay pending appeal made to the United States Court of Appeals for the Third Circuit was also denied prior to the affirmance by that Court of the dismissal of the complaint on June 8, 1981.

REASONS REQUIRING DENIAL OF THE WRIT

A. The Petition Presents No Special And Important Reason As Required By Rule 17 Because There Is No Unresolved Question Of Federal Law Nor Any Other Reason Presented Of A Character To Support A Review On Certiorari.

The sole legal issue involved in this case is the application of the principles of res judicata and collateral estoppel to preclude the Switliks' attack on the state court judgments which attack is now advanced under the Civil Rights

Act, 42 U.S.C. § 1983, on grounds which the Switliks admit have already been presented at trial and on direct appeal in the state court proceedings (Pet. 7). Switlik v. Hardwicke Corp., 446 U.S. 929 (1980).

The petition presents no unresolved and important question of federal law as the Switliks contend, particularly since the very point argued by the Switliks to the courts below--that the principles of res judicata and collateral estoppel do not apply to claims brought under the Civil Rights Act--has been unequivocally rejected by this Court's recent holding in Allen v. McCurry, ___ U.S. ___, 66 L. Ed. 2d 308 (1980), that collateral estoppel is fully applicable to claims under that Act under the circumstances here presented. Even more recently, this Court rejected the view of the Court of Appeals for the Ninth Circuit that exceptions to the principles of preclusion are warranted to accomplish "simple justice" and reaffirmed its full adherence to the principles of preclusion even where the result would be to bar relitigation of unappealed adverse state court judgments where those parties who did appeal had their judgments reversed because of a change in the relevant law. Federated Department Stores, Inc. v. Moitie, ____ U.S. ____, 49 U.S.L.W. 4687, 4689-90 (1981). In so ruling, this Court confirmed that the principle of res judicata is not a mere technical rule, stating:

> The Court of Appeals also rested its opinion in part on what it viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no

> principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." Heiser v. Woodruff, 327 U.S. 726, 733 (1946). The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Association, 283 U.S. 522, 525 (1931). We have stressed that "the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the court." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917). Id. at 4689-90.

Petitioners' contention that an exception to the settled principle of collateral estoppel is warranted in this case because of the "special nature" of the First Amendment rights of speech and petition which one of the state court judgments against Richard Switlik allegedly infringed (Pet. 8-9) is wholly without authority.* Indeed, while the

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* The cases upon which the Switliks rely are all matters where this Court, on direct appeal, found the conduct at issue protected under the First Amendment. See In re Primus, 436 U.S. 412, 426 (1978) (Pet. 9) (attorney's speech regarding legal rights of women women sterilized as a prerequisite to their receipt of Medicaid assistance and attorney's subsequent indication, at the request of the ACLU, that the ACLU would provide legal assistance to persons wishing to sue held not to constitute basis for disciplinary action); United Transporation Union v. Michigan Bar, 401 U.S. 576 (1971) (Pet. 9) (recommendation by Union of selected attorneys to its employees held not to constitute unlawful solicitation); Buckley v. Valeo, 424 U.S. 1 (1976) (Pet. 9) (federal statutory ceiling in Campaign Contributions Act on amount individuals can contribute to political campaigns held to infringe First Amendment rights); Edwards v. South Carolina, 372 U.S. 229 (1963) (Pet. 9) (convictions of civil rights protesters for breach of the peace held violation of the First Amendment where demonstration presented no threat of violence). The decision in Ulster County Court v. Allen, 442 U.S. 140 (1979) (Pet. 8), is wholly inapposite as it upholds the constitutionality of a statutory presumption of possession as against a due process attack on appeal from a state habeas corpus proceeding. Furthermore, the language of Allen quoted in the Petition

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Eighth Circuit in McCurry v. Allen, 606 F.2d 795 (8th Cir. 1979), had suggested the propriety of such an exception where Fourth Amendment rights were asserted, this Court, in reversing the Eighth Circuit, clearly rejected such an approach. 66 L. Ed. 2d at 318-20.* Compare Federated Department Stores, Inc. v. Moitie, supra, 49 U.S.L.W. at 4689-90.

Additionally, the principle which the Switliks urge upon this Court would not in any event be applicable to this case since the state trial court did not impose liability for the exercise of

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regarding the removal of deterrents to the exercise of free speech (Pet. 8) refers only to the more liberal test of standing applied in challenges to the constitutionality of a statute on First Amendment grounds.

* Both before and after McCurry, principles of preclusion have been applied to First Amendment claims. See Tomsick v. Jones, 464 F. Supp. 371 (D. Col. 1979); Williams v. Red Bank Board of Education, 508 F. Supp. 989, 994 (D.N.J. 1981).

constitutionally protected rights. The proof in the state court of Richard Switlik's malice was not limited to acts which he now contends were protected, but rather included other acts not even arguably protected for which liability should quite properly have been imposed. See pp. 15-17, supra. Many of Richard Switlik's interfering activities were characterized by trespass and subterfuge and were not limited to "reasonable and proper means." Prosser, The Law of Torts, § 129, p. 936 (4th Ed. 1971); Lewis Kamm, Inc. v. Flink, 113 N.J.L. 582, 586, 175 Atl. 62, 66 (E. & A. 1934). Evidence of activities protected by the First Amendment is not prohibited from introduction for other purposes, even if it could not form the basis for liability itself.*

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* Even if the state court had imposed liability for the activities complained of in this

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The trial proof overwhelmingly demonstrated that Richard Switlik's acts of interference were intended to interfere,

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case, which it did not, such a finding would not necessarily violate the First Amendment. As this Court has stated in Giboney v. Empire Storage Co., 336 U.S. 490 (1949):

> "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed." Id. at 502.

See also United Mineworkers v. Pennington, 381 U.S. 657, 670-71, n.3 (1965). Imposition of liability for unjustified acts of maliciously motivated interference otherwise lawful is consistent with existing common law in New Jersey, see Middlesex Concrete Corp. v. Carteret Indust. Ass'n, 37 N.J. 507, 519, 181 A.2d 774, 781 (1962), and elsewhere (see Prosser, supra, at § 129, pp. 943 et seq.; Beane v. McMullen, 265 Md. 585, 291 A.2d 37, 47 (Ct. App. 1972); see Culcal Sylco, Inc. v. Vornado, Inc., 103 Cal. Rptr. 419, 26 Cal. App. 3d 879 (Ct. App. 1972). Such law adequately protects justifiable governmental protest for proper purposes. Maliciously motivated litigation designed to injure has never been permitted to exist free of restraint. For example, malicious prosecution and abuse of process

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thus tending to establish a prima facie case of malicious interference which Richard Switlik could have rebutted as a factual matter by showing that his wrongful conduct was properly motivated, 1 Harper and James, The Law of Torts,

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have traditionally been recognized as grounds for civil liability. Similarly the First Amendment does not protect unlawful end results specifically designed to injure even where the means used in violation would otherwise be lawful as "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' [citation omitted] which the legislature has the power to control." California Motor Transport Co. v. Trucking Unlimited, supra, 404 U.S. 508 at 515 (1971); Prosser, supra, at § 120. This is the "sham" exception to the Noerr-Pennington Doctrine. Eastern RR Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, reh. denied, 365 U.S. 875 (1961); United Mineworkers v. Pennington, 381 U.S. 657 (1965).

Even the First Amendment cases upon which the Switliks erroneously rely for their contention that an exception to the principles of preclusion is warranted here recognize that not all speech or petition is absolutely privileged. See In re Primus, supra, 436 U.S. 412, 438 and Edwards v. South Carolina, supra, 372 U.S. 229, 235, 239 (Pet. 9).

§ 6.12, p. 514 (1956); see also Prosser, supra at § 129, p. 942-43, but he obviously failed to do so.

Thus, this case presents no question of general public interest and application as required for this Court's exercise of its discretionary review powers. See Rice v. Sioux City Cemetery, 349 U.S. 71, 74 (1954); Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 388, 392-93 (1923). Rather, the case is of interest only to the petitioners herein, and even to this extent, the Switliks misrepresent the impact of the issue raised here on the judgments against them by failing to advise the Court that the protected activities claim is not even applicable to the fraud judgment against Stanley Switlik ($4,912,043) and relates to only one of the three judgments entered against Richard Switlik, representing less than 2% ($117,053) of his total liability. Consequently, the "special and important reasons" required by Rule 17 to warrant this Court's exercise of its discretionary review powers are once again wholly absent, as they were on the Switliks' first petition for a writ of certiorari to review the same judgments challenged here on grounds identical to those now once again raised.

B. Petitioners Had A "Full And Fair Opportunity" To Raise, And Did In Fact Litigate, The Protected Activities Claim In The State Court Proceedings

While this Court recognized in Allen v. McCurry, supra, that principles of preclusion may not apply where the federal plaintiff did not have a full and fair opportunity to litigate the claim before the state court, that potential exception is clearly inapplicable here where the Switliks had the opportunity to and did in fact raise the protected activities claim at three levels of the state court proceedings--before the trial court, before the state appellate courts, and before this Court on their prior petition for certiorari. Petitioners' suggestion that under these circumstances they did not have the opportunity to fully and fairly litigate that question is wholly incredible. Any "working definition" of what constitutes a full and fair opportunity to litigate a claim, as the Switliks purport to seek (Pet. 10), would have no impact on this case where the record unequivocally reveals, and the petitioners in fact admit (Pet. 7), that their protected activities claim was raised before the state trial court and at every level of direct review therefrom.

The Switliks' vague reference to a lack of "conspicuous neutrality" by the trial court (Pet. 10) is wholly inappropriate. Neither in this case nor at any stage of the state court proceedings, have petitioners ever raised any allegation of some independent wrongdoing by the state courts, and, in fact, there exists absolutely no basis for any such allegation.* The argument is really directed solely at the fact that the state trial court entered, the Appellate Division affirmed, and, in the face of these very arguments being presented, the New Jersey Supreme Court and this Court declined to review the state court judgments which the Switliks feel are erroneous and which they, therefore, contend impinged on allegedly protected activity. The Switliks' vague suggestion of a lack of a "conspicuous neutrality" thus requires this Court to believe that fairness and neutrality was lacking in each of these courts, resulting in some violation of the Switliks' rights at each level of appellate review, a shocking and entirely baseless contention which exceeds the bounds of credulity.* These allegations must be recognized for what they are--but one more attempt to dress up an entirely baseless collateral attack upon the valid state court judgments in order to convince this Court to grant, in effect, yet another direct review of those judgments, contrary to this Court's limited appellate jurisdiction.

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* The only possible exception is an allegation raised on a motion for a new trial in 1978, after the state court judgments were entered, that Richard Switlik had observed the second trial judge in the state case go to lunch from time to time with another judge of the same court who had done zoning work for the Great Adventure park prior to being appointed to the bench. The motion was, of course, denied by the Appellate Division and the Supreme Court of New Jersey denied leave to appeal from that determination.

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* The Switliks' contention, citing dicta in Henry v. First National Bank of Clarksdale, 595 F.2d 291, 298 n.1 (5th Cir. 1979) to a general distrust of the capacity of state courts to render correct decisions on constitutional issues, was rejected by this Court in McCurry v. Allen, supra, which reaffirmed the Court's confidence in the ability of state courts to decide federal claims.

Petitioners' final contention* that they were denied a full and fair opportunity to litigate the protected activities claim because the judicial decisions in this matter have not explicitly addressed that point (Pet. 11-12) also has nothing to do with what is full and fair litigation. An issue need not be expressly dealt with in a judicial opinion** nor

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* The allegation concerning the hiring of attorney Muccifori by Great Adventure should be ignored as irresponsible advocacy for the reasons stated on pp. 10-11n, supra. The argument is frivolous and is advanced here only as a desperate attempt to improperly attract attention to this case.

* See Grubb v. Public Util. Comm'n, 281 U.S. 470, 477-78 (1930) (the constitutionality of a regulatory agency's order was necessarily resolved by a prior state court judgment against plaintiffs despite lack of any reference to the issue in state court opinion); Winters v. Lavine, 574 F.2d 46, 60-61 (2d Cir. 1978) (collateral estoppel found despite absence of allusion to the issue in the state court opinion); Tang v. Appellate

(Footnote continued on next page)

must there be an express determination on the issue by the court in the prior proceeding for res judicata or collateral estoppel to apply. The question of whether constitutional issues were raised and litigated in the prior proceedings is determined solely by a review of plaintiff's treatment of the issue in those proceedings.* This Court was hardly

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(Footnote continued from preceding page)

Division, 487 F.2d 138, 141n.2 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974) (silence in Appellate Division on constitutional issue raised in petition and brief immaterial); Lecci v. Cahn, 493 F.2d 826, 830 (2d Cir. 1974) ("The fact that the affirmances in the state courts were without opinion or without specific reference to the constitutional question is of course immaterial").

* Even when the matter has not been presented to the trial court but is briefed on direct appeal from the prior determination, the issue and/or the basis of the claim has been sufficiently raised as to be barred by res judicata in a subsequent proceeding. See Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 519n.7 (2d Cir.), cert. denied, 434 U.S. 834 (1977) (res judicata applied where plaintiffs' procedural due process claim

(Footnote continued on next page)

suggesting in Allen v. McCurry that a litigant is entitled to a written opinion

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(Footnote continued from preceding page)

raised only in brief in support of unsuccessful attempt to obtain leave to appeal to the New York Court of Appeals); Thistlethwaite v. City of New York, 497 F.2d 339, 341-42 (2d Cir.), cert. denied, 419 U.S. 1093 (1974) (relitigation of constitutional issue raised in briefs filed before Appellate Term and in support of certification to the Court of Appeals to review criminal conviction barred by res judicata); DiRosa v. Dodd, 514 F. Supp. 258, 265 (E.D.N.Y. 1981) (relitigation of challenge to nominating procedures of Right To Life Party barred where constitutional question raised in briefs on appeal even though no state court opinion specifically addressed the issue).

Bickham v. Lashof, 620 F.2d 1238 (7th Cir. 1980) (Pet. 12) in no way supports petitioners' contention. Bickham was a Civil Rights action by a physician to enjoin enforcement of an Illinois statute which regulated facilities in which abortions could be performed. The Court rejected the State's contention that the state court determination in a prior proceeding to enjoin performance of abortions in an unlicensed facility barred the Federal suit because the physician had no meaningful opportunity to raise his constitutional claims in the state court where that court determined that the challenged statute was valid and constitutional only 4 days after the suit was commenced, the hearing where the constitutional issues were raised was held just one day after the Complaint was filed, and no appeal had been taken.

expressly dealing with his argument before the matter is considered to have been litigated, particularly where, as in this case, the matter has in fact been raised and argued at every level of the prior state proceedings.

CONCLUSION

For all of the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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On the Brief:

FREDERIC K. BECKER
DANIEL J. SULLIVAN
CHRISTINE D. PETRUZZELL

October 9, 1981

APPENDIX

[Retyped from affidavit as filed]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RICHARD SWITLIK and STANLEY SWITLIK, Plaintiffs,	:	Civ. 80-1344
v.	:	AFFIDAVIT OF FREDERIC K. BECKER
HARDWICKE COMPANY, INC.; SIX FLAGS; GREAT ADVENTURE, INC.; JANE DOE and RICHARD ROE; ARTHUR F. BROWN, OCEAN COUNTY, SHERIFF, Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FREDERIC K. BECKER, of full age, being duly sworn according to law, upon his oath says:

1. I am an Attorney at Law of the State of New Jersey and an officer of

Wilentz, Goldman & Spitzer, A Professional Corporation, attorneys for defendants Great Adventure, Inc. ("Great Adventure"), Hardwicke Companies Incorporated ("Hardwicke") and GSC/Six Flags, Inc. ("Six Flags") in the within captioned matter.

2. I make this affidavit in opposition to plaintiffs' motion for a preliminary injunction, and for such other relief as may be appropriate.

3. It is the position of Hardwicke and Six Flags that this Court does not have in personam jurisdiction and it is their present intention to move to dismiss the claims against them on this ground.

The Prior State Litigation

4. I have been an attorney for Great Adventure throughout the seven-year history of the action in the Superior

Court of the State of New Jersey, Chancery Division, Ocean County, Docket No. C-371-73 entitled, STANLEY and WANDA SWITLIK v. THE HARDWICKE CORPORATION, GREAT ADVENTURE, INC. and HARDWICKE'S NEW JERSEY PRESERVES; HARDWICKE COMPANIES INCORPORATION, GREAT ADVENTURE, INC. and HARDWICKE'S NEW JERSEY PRESERVES v. RICHARD SWITLIK, and appeals therefrom (hereafter the "State Proceeding"), and I am fully familiar with the State Proceeding.

5. The trial record consists of at least 58 volumes of transcripts and hundreds of exhibits. Because of the volume of the record of the State Proceeding, it is impracticable to present that entire record as part of the papers being submitted in opposition to the application for preliminary injunction. I will, however, summarize the facts proved at the trial and describe the proceedings.

Overall Summary

6. Damages awarded in the State Proceeding for the consequences of the common law fraud adjudicated therein against both Stanley Switlik and Richard Switlik were in the sum of $4,912,043, including pre-judgment interest; and damages awarded against Richard Switlik for interference with Great Adventure's contract rights were in the sum of $1,318,511, including pre-judgment interest. The State Proceeding also involved a claim for tortious interference by Richard Switlik with Great Adventure's economic expectancy for which damages were awarded in the sum of $117,053, including pre-judgment interest.

7. I am informed that prior to 1977 Great Adventure and Hardwicke's New Jersey Preserves, Inc. were both subsidiaries of defendant Hardwicke and were separate corporations; and that during

the course of the New Jersey litigation Great Adventure, Inc. and Hardwicke's New Jersey Preserves, Inc. were merged into a single and new corporation called Great Adventure, Inc.

The Facts Proved At Trial

i. Interference With Contract

8. The trial proof showed that Stanley and Wanda Switlik contracted in 1972 to sell a substantial portion of their property in Jackson Township, New Jersey to Great Adventure and it was found that Richard Switlik engaged in acts of interference with that contract. The eventual closing of title resulted only after Great Adventure brought a specific performance action alleging that Stanley and Wanda Switlik refused to honor the contract of sale of the property.

9. The trial proof further showed that the specific performance suit was

settled by a closing of title on terms unfavorable to Great Adventure in order to avoid further delay and that the reduced benefits so received resulted in damages to Great Adventure. These damages were awarded to Great Adventure in connection with the finding of Richard Switlik's liability for malicious interference with Great Adventure's contractual relations.

ii. The Lot 10C Fraud

10. The trial proof of fraud related to a triangular-shaped parcel of land called Lot 10C and indicated that, prior to the closing of title, Stanley Switlik and his son, Richard Switlik, had represented Lot 10C as not being owned by Stanley Switlik but rather as having been conveyed by Stanley Switlik to the State of New Jersey years before; that Great Adventure was taking steps to obtain

title from the State of New Jersey; that unknown to Great Adventure, while the deed conveying the Switlik lands to Great Adventure was still in escrow pending the completion of the closing of title, Richard Switlik obtained and caused to be recorded an acknowledgment from the State of his father's purported ownership of Lot 10C in the form of a "corrected deed"; and that shortly after the sale was complete, Stanley Switlik announced that he was the owner of Lot 10C.

11. The trial proof also showed that the sudden post-closing claim of Stanley Switlik to ownership of Lot 10C caused Great Adventure to hold back construction of the most costly portion of the park until the Lot 10C problem was resolved. Damages for increased construction costs and lost profits were awarded to Great Adventure in connection with the findings of fraud.

iii. Interference With Prospective Economic Advantage

12. Among the acts of Richard Switlik proved at trial in connection with the claim against him for malicious interference with Great Adventure's prospective economic advantage, were the following:

(a) personally pulling of survey stakes at night;

(b) causing 20 tons of sand to be dumped in a drainage ditch;

(c) participating in the financing for a lawsuit by neighboring municipalities attacking Great Adventure's municipal approvals;

(d) attempting, immediately after the closing of title on the land sale, to cause the New Jersey Fish & Game Commission to prevent fencing of the animal park by declaring a deer run across the park;

(e) purchasing land in the name of an alleged trustee at least the partial purpose of being in a position to make complaints about the park development; and

(f) claiming after the closing of title on the land sale that his father had retained a third accessway, namely the pre-existing access road. That claim was the subject of a counterclaim heard in the first trial and resulted in a judicial declaration of the absence of any such additional access road.

The History of the State Court Proceeding

13. After the closing of title on the land sale, Stanley Switlik disputed the location of an exterior boundary of the land he had conveyed. He commenced suit in Superior Court of New Jersey, Chancery Division, against Great Adventure and Hardwicke first claiming

trespass, and then later amending his claim to demand reformation of the deed. Great Adventure and Hardwicke counterclaimed in that litigation to obtain title to Lot 10C and to resolve other title claims being asserted and, adding Richard Switlik as a party, sought recovery of damages from both Stanley Switlik and Richard Switlik.

14. Prior to the first trial, the results of which include the finding of Stanley Switlik's fraud, the Trial Court determined to initially try the issues relating to title, leaving the damage claims of both sides for future trial. After a lengthy trial, the Honorable Mark Addison found, among other findings, that Stanley Switlik had defrauded Great Adventure regarding the ownership of Lot 10C and imposed a constructive trust requiring its conveyance by Stanley Switlik to Great Adventure. That decision

was unanimously affirmed by the Appellate Division of the Superior Court (Judges Halpern, Michels and Crane) on February 2, 1976, and further review either to the Supreme Court of New Jersey or to the Supreme Court of the United States was not sought.

15. On January 10, 1976 Stanley Switlik asserted a claim for additional consideration based on the resolution of the boundary line dispute in the first trial. The claim was denied on April 2, 1976 by grant of a motion for summary judgment by Honorable Robert H. Doherty, Jr. No appeal was taken from that denial.

16. Trial of the remaining issues, i.e., Richard Switlik's liability for fraud, malicious interference with contract, and malicious interference with prospective economic advantage and the quantum of damages to be assessed against

both Switliks had been bifurcated. The remaining questions of liability were tried before a different trial Judge (Honorable Robert H. Doherty, Jr.).

17. Claims by Richard and Stanley Switlik against Great Adventure had been bifurcated at the commencement of the first trial. Of the three counterclaims asserted by Stanley and Wanda Switlik, one was voluntarily dismissed with prejudice on August 19, 1974 and the other two were voluntarily dismissed with prejudice on July 23, 1975. Of the five counterclaims asserted by Richard Switlik, two were voluntarily dismissed with prejudice on August 19, 1974, one was voluntarily dismissed without prejudice on August 19, 1974 and the remaining two were dismissed on motion of Great Adventure at the close of Richard Switlik's case in the liability trial. No appeals were taken from those dismissals.

18. After the second trial, consisting of 13 trial days, Judge Doherty found that Richard Switlik was also liable for the Lot 10C fraud, and was liable as well for his malicious interference with Great Adventure's contractual rights and for his malicious interference with Great Adventure's economic expectancy.

19. After the liability finding, plaintiffs moved for a new trial on the ground of "newly discovered evidence," to wit, that a handwriting analyst had concluded that Wanda Switlik had never signed the Purchase Agreement which was the central document in this action. The Contract of Sale, dated May 24, 1972, had been the subject of the specific performance action and had also been introduced into evidence in both the first trial and the liability trial without any question having been raised as to the authenticity of Wanda Switlik's signature; and, as the

testimony in those trials indicated, there were a number of witnesses to her signature -- including Stanley Switlik himself. Wanda Switlik was alive at the time of the first trial and did not testify. The new trial motion was made only after she died. Stanley Switlik, who witnessed the signature, presented no affidavit or testimony supporting the motion. The motion was denied and no appeal was taken from that denial.

20. The damage trial, consisting of 29 trial days, was then conducted before Judge Doherty who awarded the above referenced damages. Judge Doherty rejected substantial other damage claims of Great Adventure and all damage claims of Hardwicke.

21. The Switliks then appealed to the Appellate Division of the Superior Court of New Jersey and Great Adventure and Hardwicke cross-appealed from the

denial of a substantial portion and all of their damage claims, respectively. Prior to briefing and hearing of the appeal, there was extensive litigation in the Appellate Division concerning whether a stay should be granted since there was serious question as to whether the Switliks had sufficient assets to satisfy the judgments and they purported to be unable to secure the entire amount of the judgments by supersedeas bond. With respect to this issue, there were two separate hearings by two different panels of the Appellate Division in December, 1977 (Judges Bilder, Conford and Michels) and April, 1978 (Judges Conford, Michels and Pressler) which resulted in an order for stay of execution, on certain conditions, pending appeal. Certain of the conditions were the subject of an appeal by the Switliks to the Supreme Court of New Jersey which resulted in a modification of certain terms of the order by the Supreme Court of New Jersey.

22. Also prior to briefing and argument of the appeal, another motion was made in the Appellate Division for a new trial based on allegedly "newly discovered" evidence, this time based on the indictment of Hardwicke's banker, and the observation at the trial by Richard Switlik that Judge Doherty occasionally went to lunch with another trial judge on the same Court who had performed legal work for Great Adventure prior to ascending the bench. That motion was denied by the Appellate Division, and a motion for leave to appeal was denied by the Supreme Court of New Jersey on May 24, 1978.

23. After the appeal was fully briefed, but prior to oral argument before the Appellate Division, plaintiffs moved to supplement the appendix with an extensive "certification" and documentary

exhibits, many being matters not of record, which they argued should be considered on appeal. That motion was denied by the Appellate Division in April, 1979.

24. After oral argument before still a fourth panel of the Appellate Division (Judges Lora, Michels and Larner) on May 1, 1979, the findings of Judge Doherty were unanimously affirmed by the Appellate Division by decision dated May 31, 1979. The cross-appeal of Great Adventure and Hardwicke as to rejected damage claims were denied at the same time. In rendering its decision, the Appellate Division stated that:

> "[T]he judgments of the trial court is [sic] based on findings of fact which are adequately supported by the evidence; the determination of the trial court on the motion for a new trial does not constitute a manifest denial of justice, and that all issues of law raised are clearly without merit. R.2:11-3(e)(1)(A),(C) and (E)."

25. Plaintiffs then petitioned the Supreme Court of New Jersey for certification to review that Appellate Division determination, which petition was denied on October 4, 1979. When their petition was denied, the Switliks moved for reconsideration of the denial of certification which motion was also fully briefed in the Supreme Court. The motion for reconsideration was denied on December 20, 1979.

26. The Switliks then petitioned for writ of certiorari to the Supreme Court of the United States essentially on the grounds raised in Count I of this action. On April 28, 1980, the Supreme Court of the United States denied plaintiffs' petition for certiorari.

27. An application to the Supreme Court of New Jersey for a stay pending determination of the proposed petition for a writ of certiorari was granted, but

only through February 11, 1980 to permit the Switliks time to file an application to the Supreme Court of the United States. On February 4, 1980, the Switliks made application for a stay to Justice William J. Brennan of the Supreme Court of the United States which application was denied on February 5, 1980. Thus, as of February 5, 1980 there has been no restriction against execution in satisfaction of the judgment.

Prior Litigation in State Court of the Specific Issues Raised Here

28. The so-called First Amendment issue raised here was raised by Richard Switlik at every level of the State Case, commencing with the liability trial in relation to the counterclaim against him charging interference with the economic advantage of Great Adventure and Hardwicke.

29. Pursuant to that claim, Great Adventure and Hardwicke interposed certain evidence at the liability (second) trial regarding the acts described in paragraph 12, supra.

30. To establish the requisite legal malice for the acts of interference and for no other purpose, Great Adventure and Hardwicke additionally offered proof that Richard Switlik had written 46 letters to various state, municipal and county officials complaining about the park in an effort to delay and impede the park; and had appeared before the Jackson Township Planning Board in opposition to there being an entertainment park, and obtained an objecting expert witness to do the same.

31. In response to this proof, and particularly with respect to the sending of 46 letters, Richard Switlik claimed

that some of his conduct was constitutionally protected.

32. On appeal to the Superior Court of New Jersey, Appellate Division, Docket No. A-995-77, that argument was again developed by Richard Switlik. A copy of the relevant portion of the Switlik Brief on that appeal (pp. 85-90) is attached hereto as Exhibit A.

33. The Switliks' petition for certiorari to the United States Supreme Court again asserted that argument and their reply memorandum to that Court was apparently submitted for the sole purpose of urging that the issue had been raised in the State Proceeding. (A copy of the relevant portion of the Petition (pp. 15-20) and of the entire reply memorandum are attached as Exhibits B and C hereto).

Insufficiency of Switlik
Assets to Pay Judgment

34. The Switliks have provided financial statements in connection with the State Proceeding. The latest of these statements, dated January 11, 1980, reflecting real estate at assessed values, indicate that the net worth of Stanley Switlik is something less than $4,268,566* and the net worth of Richard Switlik is something less than $1,272,244. My clients are thus concerned that the assets available for execution will be insufficient to satisfy the judgments.

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* The financial statement indicates that this amount includes $1,217,993 of marketable securities (valued at January 8, 1980) which are pledged "to counsel and creditors." It is my understanding that at least $1,000,000 of these securities are pledged to secure a $1,000,000 supersedeas bond in respect of the judgments. The Switliks had indicated to the Appellate Division their inability to secure a larger bond and so the major portions of the judgments are not bonded.

Problems with Prior Stays

35. A problem has arisen with respect to the conduct of the Switliks during a past stay of execution granted by the State Court. It appears that they have not been paying taxes on real property owned by them which partially secures the judgments and, therefore, they appear to be in default of the Appellate Division's order of December 30, 1977. (A copy of that Order is attached hereto as Exhibit D).

36. Pursuant to the December 30, 1977 order, substantial assets of the Switliks were assigned to Great Adventure to secure the outstanding judgments, with the exception, however, that the Switliks retained "... the right to receive income, interest or dividends accruing on any of the property [so assigned] ...," with an exception not relevant but subject to the requirement that such income

be applied "... in the first instance to pay taxes on and maintain real estate owned by them on a current basis, and to make payments when due on principal or interest on any loans which are secured by a lien prior to that given to the Judgment Holders herein." (Exhibit D, p. 4, ¶ 2).

37. I am informed that in early December 1979, Great Adventure learned from a newspaper published in Jackson Township, New Jersey that 1978 and 1979 taxes on some of the real estate owned by the Switliks and partially securing the judgments had not been paid and that the property was to be included in a public tax sale; that Great Adventure, therefore, felt compelled to use its own funds to purchase certain tax sale certificates at a public tax sale on December 18, 1979 to protect its interests, to the extent it could purchase the certificates at the

cost of unpaid taxes; and that it attempted to do so by sending a representative to the tax sale and purchasing some of the tax sale certificates on property securing the judgments. I am further informed that as to a substantial number of the certificates being sold Great Adventure was outbid by one of Richard Switlik's sons who paid a premium for those certificates purchased by him.

38. A subsequent tax search indicated that except for Richard Switlik's home in Allentown, New Jersey, plaintiffs have not paid taxes on real property owned by them in New Jersey in 1979 and that Richard Switlik was even partially delinquent in payment of 1979 taxes on his home.

39. As a result of what has occurred, Great Adventure's right of execution against real property has already been complicated by plaintiffs' failure

to pay taxes, apparently in violation of the prior stay granted by the Appellate Division. For these reasons, Great Adventure is concerned that its ability to satisfy its judgment will further deteriorate if an additional stay is granted.

/s/ Frederic K. Becker
Frederic K. Becker

Sworn to before me this
23rd day of May, 1980

/s/ Daniel J. Sullivan
Notary Public

Daniel J. Sullivan
Notary Public, State of New York
No. 31-1878448
Qualified in New York County
Commission Expires March 30, 1980

TYPEWRITER MARGIN SETTINGS

Superior Court of New Jersey

Appellate Division—Docket No. A-995-77

STANLEY SWITLIK and WANDA SWITLIK,
Plaintiffs-Appellants,

—*v.*—

THE HARDWICKE CORPORATION; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC., jointly, severally and in the alternative,
Defendants-Respondents.

HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC. and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Counterclaim-Plaintiffs-Respondents,

—*v.*—

RICHARD SWITLIK,
Additional Defendant-Appellant on Counterclaims.

CONSOLIDATED CIVIL ACTIONS—On Appeal from Judgment on Liability and Final Judgment Awarding Damages of the Superior Court of New Jersey, Chancery Division—Ocean County. Sat Below: Doherty, Jr., J.C.C. (Temporarily Assigned)

BRIEF FOR APPELLANTS SWITLIK

EXHIBIT A

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(App. Div. 1972) (suit instituted to prevent conversion of apartment house to cooperative justified as within legal rights); Barlow v. Brunswick Corp., 311 F. Supp. 209 (E.D. La. 1970) (Brunswick justified in foreclosing deal between Mosconi and plaintiff because Mosconi was under long-term contract with Brunswick which included restrictive covenants); Grotrian Helfferich, Shultz The Steinwag Nachf v. Steinway & Son, 365 F. Supp. 707 (S.D.N.Y. 1973) (threat of legal action for trademark infringement justified). See also Black Lake Pipeline Co. v. Union Construction Co., 538 S.W.2d 80 (Texas 1976); Singer Credit Corp. v. Mercer Island Masonry Inc., 13 Wash. App. 877, 538 p.2d 544 (1975); Frank v. 903 Park Avenue Co. Inc., 355 N.Y.S.2d 329 (Civil Ct. 1974).

It is undisputed that Richard Switlik, at all times during his alleged interference, owned property (tracts 143 and 133) contiguous to the Hardwicke property. He acquired these properties by purchase from his father in the summer of 1973. He was, therefore, an adjoining landowner who was interested in the use of the property sold by his father.

Judge Doherty stated in his opinion that Richard Switlik purchased the "Seelig property" for the partial purpose of being in the position as a neighbor to make complaints against Hardwicke. (Sa95-18) He did not need to do so. Judge Doherty claims that Richard Switlik made "numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities." (Sa95-15) As an adjoining landowner he had an absolute right to do so. He also had an absolute right to appear before the Planning Board to speak out in opposition to the location of the amusement park. Judge Doherty claims that Richard Switlik participated in financing a law suit by the Environmental Commission of Upper Freehold. He did not, but even if he had it would have been within his legal right to do so.

The courts have upheld the rights of neighboring landowners to complain to governing bodies concerning the use of the neighboring property. In Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (1972), the Maryland Supreme Court had to deal with a situation they described as a "Hatfield-McCoy" case. The McMullens had complained constantly to various governmental authorities from 1965 through 1970 concerning the use of the adjoining property by the Beanes. The actions of the McMullens included letters to the zoning authorities, public works department, county commissioners, local congressman and others. The Beanes ultimately filed a suit claiming interference with economic advantage inasmuch as the constant complaints were affecting Beane's use of his property for business purposes. The Court found for the McMullens, declaring that their partial success before the Planning Board indicated that their complaints were not without basis (291 A.2d at 48):

> Then, too, as we have already stated, the Park and Planning Committee found that no non-conforming use had been established in regard to either oil storage tanks or the parking of oil trucks and forbade the continuation of both [by the Beanes]. The Board of Zoning Appeals, however, found that the evidence did support a non-conforming use on one side of the Beane property for the parking of oil trucks, but otherwise affirmed the Park and Planning Commission. In short, the McMullens were successful on the more important issue and were partially successful in limitng the scope of the non-conforming oil truck parking use. The language of the complaint was not inflammatory, and the complaint was made to protect the property of the McMullens from what they reasonably thought was a

> neighboring commercial encroachment in a residential use zone. In our opinion, the trial court acted properly in concluding that there was no evidence from which the jury could find a malicious interference with the business of Mr. Beane. See Small v. United States, 333 F.2d 702 (3rd Cir. 1964); Appalachian Power Co. v. American Institute of Certified Public Accountants, 268 F.2d 844 (2d Cir. 1959), cert. denied, 361 U.S. 887, 80 S. Ct. 1958, 4 L. Ed. 2d 121 (1959).

In the present case, the letters of Richard Switlik to public agencies responsible for overseeing the environmental and land use effects of the Hardwicke construction were not without success either. Violations were discovered and prosecuted by these agencies. As to the Planning Board, Richard Switlik was only one of many neighbors to the Hardwicke property who objected to the use proposed.

A prime example of such success is the response Richard Switlik received from the Department of Environmental Protection (Sa221):

> We are in receipt of your letter dated May 13 regarding the sewage system now under construction at the Great Adventure Park. According to our Bureau of Water Pollution Control, Great Adventure has not obtained the necessary permit to construct the sewage treatment facility and the present construction on the site is indeed in violation of the law. The case has been turned over to the Enforcement Section of the Bureau of Water Pollution Control for investigation. Upon completion of this investigation, a Notice of Prosecution will be issued to Great Adventure. They will be requested to halt construction pending the issuance of the permit. If Great Adventure does not comply with the request to halt construction on the sewage treatment facility, the case will then be turned over to the Attorney General's office for appropriate action.

Indeed, a fine of $6,000 was levied against Great Adventure and paid by them, as indicated in a letter to Richard Switlik from the Attorney General dated July 9, 1974. (Sa229) Similarly, Hardwicke violated other laws as pointed out by Richard Switlik, including the failure to obtain mining permits or to provide an Environmental Impact statement. (See Sa277) The appropriate governmental agencies investigated and prosecuted these violations. (Sa282).

In Wartensleben v. Willey, 415 P.2d 613 (Wyo. 1966), Willey succeeded in preventing Sheridan Flouring Mills Inc. from completing a contract with his neighbor Wartensleben for the establishment of a feedlot for cattle on the Wartensleben land. Willey did not deny that he threatened to bring an action for injunction on the grounds of nuisance if the feedlot was constructed and operated on the property adjoining his. The Mills therefore opted not to proceed with their contract. The Supreme Court of Wyoming found Willey justified in his actions because of a good faith belief that the feedlot would be detrimental to his adjoining property, both as a nuisance and as a pollutant. The fact that the action for an injunction might not have succeeded was not the key to the Court's decision. On the contrary, the mere existence of the right to bring the action was sufficient (415 P.2d at 615):

> The question before the trial court was whether Willey and his attorney honestly and in good faith believed the proposed feed lot operation would have constituted a nuisance; or whether they had reasonable grounds to believe such operation--under the circumstances here present--could be enjoined as a nuisance. The trial court did not need to decide and we do not decide, whether Willey and his attorney would or would not have been successful if the lot had been established and they had initiated an injunction action.

As a neighboring landowner, therefore, Richard Switlik had every right to proceed as he did to enforce compliance with applicable laws and regulations. Such right serves as a justification in any action against him for tortious interference with economic advantage.

Consideration must also be given to Richard Switlik's right to free speech guaranteed by the First Amendment to the Constitution. Judge Doherty's rulings surely have a "chilling" effect on a citizen voicing opposition to a project affecting his interests either before public boards, such as the Planning Board, or by way of complaint to appropriate governmental officials. Judge Doherty provides no guidelines, if, indeed, such can be prescribed, for limiting the right to free speech so as to avoid civil liability for tortious interference. Even if the likelihood of liability for such a tort in the exercise of free speech is slim, the magnitude of the damages possible for delaying or stopping major projects such as Great Adventure would deter almost every citizen. The effect of public hearings and public watchdogs for regulatory violations would soon become nil.

The Court should also consider the aspect of "malice" in these cases. Apparently Judge Doherty was very much impressed by evidence that Richard Switlik was motivated by "ill will" toward the Hardwicke interests. It is submitted that the New Jersey courts, in line with the better-reasoned cases throughout the country, have distinguished clearly between legal malice and malice in the sense of ill will. "Legal malice" represents the absence of justification. "Malice" in the sense of ill will does not constitute an element of tortious interference with contract or economic advantage and should not play a part in the reasoning of the Court. The New Jersey Supreme Court set forth this principle clearly in Middlesex Concrete Corp.

v. Carteret Indus. Ass'n, 37 N.J. 507, 518-19 (1962):

> Plaintiffs suggest that defendants are not entitled to the comfort of this privilege because their actions were "maliciously" prompted. They use that term in the ordinary parlance, meaning ill will, and not in the technical sense wherein it is defined as "the intentional doing of a wrongful act without justification or excuse." Louis Kamm Inc. v. Flink, supra at p. 588.
>
> A purely malicious motive to injure plaintiffs should of course fall without the ambit of any privilege. It has been held, however, that where defendant has a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

STANLEY SWITLIK and RICHARD SWITLIK,
Petitioners,

—*v.*—

THE HARDWICKE CORPORATION; HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

WILLIAM B. MCGUIRE,
Counsel for Petitioners,
550 Broad Street,
Newark, New Jersey 07102.
(201) 622-2300

EXHIBIT B

Reasons for Granting the Writ

A. The trial court's reliance on activities in which Richard Switlik engaged for the purpose of imposing tort liability violated petitioner Richard Switlik's First Amendment rights as guaranteed by the due process clause of the Fourteenth Amendment.*

In reaching the determination that Richard Switlik was liable for tortious interference with respondent's prospective economic advantage, the trial judge relied on seven discrete activities engaged in by Richard Switlik: (1) allegedly participating in a fraud against respondent; (2) lodging of numerous complaints by letter to official governmental bodies concerning respondent's activities; (3) persisting in claiming that his father had access to property through a particular access road; (4) purchasing the "Seelig property" for the alleged purpose of making complaints in connection therewith through his trustee; (5) participating in the financing of a lawsuit by the Environmental Commission of Upper Freehold; (6) allegedly causing twenty tons of sand to be dumped in a drainage area to the disadvantage of respondent; and (7) appearing before the Jackson Township Planning Board and speaking out in opposition to the location of respondent's entertainment park.

Although individually enumerating each of the foregoing activities, the trial judge determined that only the cumulative effect of these activities was sufficient to impose liability on Richard Switlik. Indeed, the trial judge commented in his July 14, 1976 letter opinion: "I conclude that many of the above activities taken separately would not be wrongful."

---

* Although petitioners seek review of the judgment of the Superior Court of New Jersey, Appellate Division, the ensuing legal discussion necessarily focuses on the trial court's determinations since only the trial court explicitly discussed the issues involved herein, the Appellate Division thereafter in general terms affirming the lower court's judgments.

We submit that four of the seven activities relied on by the trial court in construing the common law of New Jersey respecting tortious interference with prospective economic advantage are fully clothed with First Amendment protection, namely, those activities heretofore denominated (2), (4), (5) and (7). Since each of these activities was used by the trial judge in finding liability, we submit that the entire judgment entered against Richard Switlik ultimately must be reversed.*

That Richard Switlik's lodging complaints with various governmental agencies relative to respondent's activities, his contribution to funding a lawsuit instituted to protect the environment, his purchase of property, a portion of which was held in trust for his benefit, which subsequently formed the basis of a lawsuit commenced by his son to protect said property, and his appearances before the Jackson Township Planning Board for the purpose of voicing opposition to respondent's planned development of an entertainment park—that all these are activities protected by the First Amendment is evident from a reading of this Court's decisions respecting the sanctity of free speech guarantees. As was the case with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), we believe that the within matter should be considered "* * * against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open * * *." *Id.* at 270. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966).

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* Although respondent has asserted in its brief to the Appellate Division (at p. 76) that "[d]amages of $89,140 were awarded against Richard Switlik for malicious interference with the prospective economic advantage of [respondent]," the trial court's letter opinion assessing damages against both petitioners, dated August 26, 1977, does not explicitly state the legal theory of liability pursuant to which the aggregate judgment against Richard Switlik was entered. Consequently, were this Court to grant certiorari and later hold that the trial court's reliance on certain activities in which Richard Switlik engaged was constitutionally defective, we believe the entire judgment against Richard Switlik would require vacation. Moreover, as discussed at B., *post* at 21-22, the trial court's conclusion that activities engaged in by Richard Switlik constituted malicious interference—activities which we maintain are protected by the First Amendment—may have so infected the entire proceeding below that the aggregate judgment against *both* petitioners requires reversal.

We begin with the proposition that the trial court's interpretation of the common law of New Jersey respecting the theory of tortious interference with prospective economic advantage constitutes state action sufficient for petitioners to claim the protection of their First Amendment guarantees. See *New York Times Co.* v. *Sullivan,* 376 U.S. at 265.

Regarding the so called "Seelig litigation" and Richard Switlik's contribution to financing a lawsuit instituted by the Environmental Commission of Upper Freehold, we note that this Court has affirmed the principle that "'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'" *In re Primus,* 436 U.S. 412, 426 (1978), quoting from *United Transportation Union*

v. *Michigan Bar,* 401 U.S. 576, 585 (1971). See also *California Transport* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1972); *Brown* v. *Glines,* 48 U.S.L.W. 4095, 4099-4100 (Decided Jan. 21, 1980) (Brennan, J. dissenting). Moreover, the right to associate with others in the expression of opinion—even where such association is accompanied by financial contribution—is not open to question. See *Buckley* v. *Valeo,* 424 U.S. 1, 15 (1976). We submit that the trial court's reliance on Richard Switlik's participation in these lawsuits for the purpose of imposing tort liability directly contravened this Court's decisions respecting access to the courts and the right to petition one's government.*

Next, regarding Richard Switlik's lodging complaints by letter to various governmental agencies, and his appearances before the Jackson Township Planning Board, we believe the inviolability of these rights is too settled by decisions of this Court to require extensive discussion. See *e.g., Edwards* v. *California,* 372 U.S. 229, 235 (1963); see generally *Herbert* v. *Lando,* —— U.S. ——, —— nn. 1, 2 & 3 (1979) (Brennan, J., dissenting in part). Where the interpretation of a state's common law results in activities such as the foregoing being deemed evidence of an element of tortious activity—indeed, being deemed the tortious activity itself—this Court's intervention becomes a necessity.

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* We believe that the opinion of Justice Black for an unanimous Court in *Eastern R.R. Conference* v. *Noerr Motor Freight,* 365 U.S. 127 (1961), although ostensibly not considering First Amendment issues, see id. at 132 n.6, dispells any notion that Richard Switlik's motive in petitioning his government, or even the alleged "third-party technique" employed in the Seelig litigation, is sufficient to deprive him of constitutionally protected rights. Furthermore, the interest that both petitioners had in the environmental integrity of their property and, indeed, surrounding properties—an interest evidenced long before their dealings with respondent— belies any idea that Richard Switlik's attempts to force respondent to comply with applicable environmental regulations was a "sham." See *In Re Primus,* 436 U.S. at 428 n.20.

The effect of the decisions below naturally is not limited to depriving Richard Switlik of his First Amendment guarantees. If the decision of the trial judge is permitted to stand, citizens of New Jersey who (a) legitimately complain to governmental bodies; (b) file *bona fide* lawsuits in order to protect the surrounding environment; or (c) voice opposition to community projects in the very forum designed to air such grievances, will necessarily run the risk that their conduct may result in civil liability for tortious interference with another's prospective economic advantage. Their only alternative to assuming such a risk will be to unduly circumscribe their activities, leading to the erosion of the "robust and wide-open" public debate this Court has heretofore sought to protect by its First Amendment jurisprudence.

The citizens of New Jersey have at stake in the within matter no less than petitioner Richard Switlik. For if the decision of the trial judge respecting petitioner Richard Switlik's First Amendment rights remains undisturbed, and if on the basis thereof private citizens refrain from voicing their opinions on matters of public importance because of the fear of civil liability, the public at large is deprived of the fullest exposition of ideas possible relative to a given issue. The predictability of this result is perhaps most eloquently alluded to by Professor Meiklejohn, quoted in *Herbert* v. *Lando,* —— U.S. at ——n.3 (Brennan, J., dissenting in part):

> "'Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or

> criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.' A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 22 (1965) [Emphasis in the original]."

We submit that the within matter implicates the very "thinking process of the [New Jersey] community," and that this Court, in order to prevent the "mutilation" thereof, should ultimately reverse the trial judge's reliance on activities engaged in by Richard Switlik, fully protected by the First Amendment, for the purpose of imposing tort liability. The interpretation by the trial court of New Jersey's common law respecting tortious interference with prospective economic advantage cannot "withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights. . . .'" *In re Primus,* 436 U.S. at 432, quoting from *Buckley* v. *Valeo,* 424 U.S. at 44-45 (1976).*

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* The trial court's legal conclusion on the issue of tortious interference with prospective economic advantage, being absolutely essential to its finding of liability, and being thereafter affirmed by the Appellate Division, appears now to be the law of New Jersey by which other trial courts are bound. To the extent, however, if any, that the opinion of the Appellate Division, not having been

(Footnote continued on following page)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,
Petitioners,

—*v.*—

THE HARDWICKE CORPORATION; HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITIONERS' REPLY MEMORANDUM

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EXHIBIT C

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IN THE

Supreme Court of the United States

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THE HARDWICKE CORPORATION; HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITIONERS' REPLY MEMORANDUM

The brief submitted in opposition to the petition for certiorari raises a number of issues not addressed in the petition, only one of which, however, warrants a reply. In the footnote appearing at page 12 of the respondent's brief, an apparent effort is made to dissuade this Court from granting the petition, the text of the footnote reading as follows:

> This so-called "free-speech" argument which Richard Switlik is now emphasizing played a minimal role in the appeal of this case up to the time of the petition (Petition, pp. 9-14). It consumed seven pages of the Switliks' 124 page brief to the Appellate Division of the Superior Court and was not even raised in their petition for certification to the Supreme Court of New Jersey or in their motion to that Court for reconsideration of its denial of certification [Rb12n*].

To begin, it is implicitly conceded by respondent that the First Amendment issue *was indeed raised* in the Superior Court of New Jersey, Appellate Division. Instead of acknowledging that petitioners have complied with the preconditions of raising federal constitutional issues in this Court—and moving on to discuss the substance of these issues—respondent makes the altogether irrelevant observation that the First Amendment issue "consumed seven pages of the [petitioners'] 124 page brief to the Appellate Division of the Superior Court . . .," an observation designed to suggest that this issue not now be considered. Apart from the invalidity of respondent's arithmetical comparison,[1] there is no quantitative requirement with respect to raising issues below that compels a litigant to devote a certain number of pages of discussion to a federal constitutional issue, lest he waive his right to renew that argument in this Court.

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[1] Petitioners' brief to the Appellate Division, although a total of 124 pages, contained only 60 or so pages of legal argument; the balance comprised of a Procedural History and a Statement of Facts. Thus, the seven pages of legal argument devoted to the First Amendment issue, when compared to the total number of pages devoted to all legal argument, takes on a significance far greater than respondent would have this Court believe.

With regard to respondent's assertion that the First Amendment issue was not raised in either the petition for certification to the Supreme Court of New Jersey or the motion for reconsideration of the denial thereof, the following should be noted. Rule 2:12-7(a) of the New Jersey Rules of Court provides, *inter alia,* that a petition for certification "* * * shall be in the form of a brief * * * not exceeding 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of table of contents, citations and appendix * * *." In view of the page limitation regarding petitions for certification to the New Jersey Supreme Court, it is clear that the petition itself cannot explicitly put before the Court all the issues raised below, particularly in cases such as the one herein where countless issues have been raised in the Appellate Division. In order to alleviate this difficulty, Rule 2:12-7(b) provides that, within 10 days after filing the Notice of Petition for Certification, 9 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court. Thus, once petitioners filed the required copies of their Appellate Division brief with the New Jersey Supreme Court, the First Amendment issue raised herein was squarely before it.

Finally, it should be pointed out that, after petitioners filed their Motion for Reconsideration in the New Jersey Supreme Court, and after respondent replied thereto, petitioners filed a letter memorandum with the New Jersey Supreme Court (attached hereto as Appendix "A"), before the Motion was decided, wherein they explicitly stated:

> Hardwicke's claim that acts unrelated to the contract of sale involving Richard also constituted interference is plainly frivolous, and an obvious effort to distract this Court from the legal error committed by the courts below regarding the privilege of an agent. Each one of the alleged acts to which Hardwicke refers (Rb Rp. 10*) would have been within the general scope of Richard's agency, an agency which Hardwicke has repeatedly recognized. Moreover, many of these acts, ***independent of the question of agency,*** are fully protected by the First and Fourteenth Amendments to the United States Constitution [Petitioners' letter to the New Jersey Supreme Court, dated November 29, 1979; emphasis in the original].

In view of the foregoing, it is somewhat disingenuous of respondent to suggest that the New Jersey Supreme Court was unaware of petitioners' First Amendment argument.

Except for respondent's suggestion that petitioners did not properly raise the federal constitutional issues below —a suggestion which for the reasons stated heretofore has no merit—respondent has not even attempted to deal with the substantive considerations raised in petitioners' application. Indeed, respondent has all but ignored the decisions of this Court which petitioners discussed in their petition, relying instead on cases interpreting various states' common law in the context of tortious interference with either prospective economic advantage or contract. Precisely the issues which petitioners seek to have this Court review, respondent sidesteps. Perhaps that is because there is no constitutionally sound basis upon which to oppose petitioners' arguments. Under the circumstances, petitioners submit that a writ of certiorari should issue in this matter to review the judgment and opinion of the Superior Court of New Jersey, Appelalte Division.

Respectfully submitted,

William B. McGuire
Counsel for Petitioners, Stanley and Richard Switlik.

April 14, 1980.

[Appendix Follows]

APPENDIX A

Letter Memorandum Filed with the New Jersey Supreme Court

[Letterhead of Lum, Biunno & Tompkins]

November 29, 1979

The Honorable Justices of the
Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: *Stanley Switlik and Wanda Switlik* v. *The Hardwicke Corporation, etc., et al.*: Motion for Reconsideration of Denial of Certification (Petition for Certification Docket No. 16,201; Denial of Certification Docket No. C-119; Motion for Reconsideration Docket No.)

Dear Justices:

We have reviewed the respondents' brief, received by us on November 26, 1979, answering the brief filed by us in petitioners' behalf in support of their motion for reconsideration. This reply is impelled not by respondents' unwarranted hyperbole, nor by the personal attacks in respondents' brief on one of the petitioners, but, rather, because of material omissions and inaccuracies which appear therein.

We shall endeavor to deal, as summarily as possible, both with certain fundamental errors contained in the respondents' answering brief, and their perhaps unwitting admissions of circumstances which support certification.

Appendix A

I.

Petitioners have pointed out that essential elements of the tort of fraud, including alleged causally related damages, were neither proved nor found. Respondents were required to prove, *inter alia,* a material defect in title. Hardwicke now responds that determining the "exact" location of 10C was unnecessary. This response, particularly the calculated use of the word "exact," is obviously designed to create the impression that Hardwicke was aware of a close approximation of the location and size, and *a fortiori* the existence, of Lot 10C. No response could be more disingenuous, as Hardwicke's direct statement to the Appellate Division in its brief on the appeal from the Addison decision makes abundantly clear:

> To this day the *location and existence* of Lot 10C has not been established. It can be done only by a survey of hundreds of acres conveyed by Switlik to the State of New Jersey in 1964. This has never been done (Emphasis supplied; Pet. App. p. 34).*

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* References used herein are:

Pet. App.	— Appendix to Petition for Certification.
Sa	— Appendix to Switlik Brief in Appellate Division.
Pet. Cert.	— Petition for Certification.
PbR	— Petitioners' Brief in Support of Reconsideration.
RbR	— Respondents' Brief on Reconsideration.
T//	— Transcript with appropriate date.

Equally misleading is Hardwicke's most recent assertion that the location of 10C was regarded as significant. This is wholly belied by Hardwicke's representation in its brief on the Addison appeal:

> Hardwicke was prepared to acquire the Switlik property from the Switliks despite the Lot 10C imperfection. There appeared to be adequate room for passage north of Lot 10C (Sa 361).

Beyond its contradictory positions to different appellate tribunals in New Jersey, Hardwicke has also failed to acknowledge its devastating written admissions to the executive branch of New Jersey state government at the time in issue (P442a, 444a) that there was a question whether 10C existed, where it was located and that it was "indeterminate" in size and location, of no more than ½ an acre, and not worth a survey to find, since its value was substantially less than the cost of a survey.

Hardwicke's argument that the fear of ownership of 10C by the Switliks, rather than by the State of New Jersey, is insufficient to obviate the need for finding whether 10C existed. If 10C did not exist, were small, or could not affect the park, who owned it obviously would be unimportant, and no legitimate claim could have been made against Stanley Switlik for failure to transfer it. Location, size, and existence were therefore essential to be proved for any successful claim. On the other hand, if 10C were shown to be important to Hardwicke when located, and were owned by the State of New Jersey, Hardwicke could not assume, as they suggest, that the State would quickly surrender its valuable rights, that the approval of the State House Commission would probably follow in any given time frame, or that Hardwicke could use the state lands in the interim.

Clearly then, despite its most recent efforts to disguise previous assertions of record, Hardwicke has utterly failed to refute petitioners' position that New Jersey precedent regarding fraud requires proof of materiality of fact, falsity, reliance and casually related damages.

On the matter of malicious interference, we believe the Court should read respondents' presentation as acknowledging that Richard Switlik was the negotiating agent for his father. Indeed, in light of the express representations to exactly that effect by Hardwicke in other litigation between the same parties, previously referred to (PbR p. 15 ¶15; Pet. Cert. p. 6), and Judge Addison's finding, Hardwicke could no no less, although its Appellate Division Brief directly denied the agency relationship. What appears to be the basis for respondents' argument is that Richard, as agent for his father, should not be protected if he was acting in his own interest. Apart from that issue having never been resolved by this Court, and itself a basis for granting certification, respondent acknowledges that Stanley Switlik demanded the very clauses which his son had requested. (RbR p. 22). As the Court is aware, that, in and of itself, constitutes proper delegation and ratification, and thus independently makes the acts of Richard, from their commencement, the acts of his prinicpal. That acknowledgement is also a basis for granting certification.

We can understand why an attempt would be made by respondents to distinguish Richard from the interests of his father for the purpose of creating a large claim. But each of the clauses sought in the contract between Hardwicke and Switlik (as previously demanded by Stanley Switlik's attorney on his client (Stanley) instructions (PbR p. 12 ¶5)), now forming the basis for the judgment against Richard for interference, was a change which benefited the father, a party to the contract, as seller, and not Richard. It would be a significant perversion of the law to claim that such acts would solely serve the benefit of the agent. The obvious intention of this perversion is the avoidance of what we believe is the privilege of an agent against liability for interference. Again, this is a legal question of significant public importance, satisfying one of the criteria enumerated in R. 2:12-4.

Hardwicke's claim that acts unrelated to the contract of sale involving Richard also constituted interference is plainly frivolous, and an obvious effort to distract this Court from the legal error committed by the courts below regarding the privilege of an agent. Each one of the alleged acts to which Hardwicke refers (RbR p. 10*) would have been within the general scope of Richard's agency, an agency which Hardwicke has repeatedly recognized. Moreover, many of these acts, *independent of the question of agency,* are fully protected by the First and Fourteenth Amendments to the United States Constitution.

II.

Without intending to diminish any of the issues raised in Petitioners' brief on reconsideration, and in no way conceding any of the points in respondents' brief not addressed specifically herein, we discretely discuss the following two aspects of respondents' brief.

A.

CAUSATION AS TO FRAUD CLAIM

Petitioners have pointed out to this Court Hardwicke's formal representation to the trial court that, independent of any other reason, the delay in getting title until June 21, 1973 caused the alleged delay in opening the park. In response, in its most recent brief filed with this Court, Hardwicke attempts to disavow this fatal admission by stating that "the Switliks' assertion of title to Lot 10C caused it to hold back development of the entertainment portion of the park, *even including th development of preliminary drawings and floor plans for the site plan application* [Emphasis supplied; RbR at p. 18]."

We call the Court's attention to what must be obvious: The respondents' effort to demonstrate that the alleged fraud, *rather than failure to obtain final site plan approval from the Jackson Township Planning Board*, caused the delay in opening, contradicting its own trial brief, is wholly unaccompanied by citation to the record. This absence of supporting record reference is due, quite simply, to its non-existence.

That Hardwicke did not hold up preparations for site plan approval, at all, is clear from the record. The President of Hardwicke testified that he authorized the obtaining of site plan approval for the theme or entertainment park without regard to 10C (T 1/31/77, p. 39). Mr. Ney, the engineer employed to obtain that approval, testified that his firm was retained in July 1973 to do so (before the 10-C issue arose), and that he needed three months to complete the plans and other submissions which would be required by the Planning Board. Given the date of retention, the filing and completion could not have been accomplished earlier. As Mr. Ney said: "Work proceeded from the day we were first engaged towards a complete site plan application . . . I believe it's the 5th or 6th of November, I submitted the plans to the Township Engineer." (T2/2/77, pp. 19-24). Thereafter, final approval did not occur, after separate litigation finding defects in the submission, until December 26, six days *after* Judge Addison rendered his opinion in the 10C case. Until site plan approval, neither final plans nor construction could have proceeded.

These egregious errors of fact in respondents' submission further demonstrate the prejudice suffered by petitioners, aggravated by the failure of the lower courts to make findings required by the Rules. R. 1:7-4. At this late stage such error cannot be excused.

B.

MALICIOUS INTERFERENCE

Release and Single Controversy

Hardwicke asserts, again unaccompanied by citation to the record, that the release given by it to Stanley and Wanda Switlik could not have simultaneously released Richard from alleged tort liability for interference, and that the single controversy bar, resulting from the dismissal of the specific performance and delay suit, and its settlement on closing, does not apply because Hardwicke was unaware of the interference at the time.

That is, on its face, incredible. Nearly all of the claimed interference made the subject of judgment for liability and damages related to direct negotiations of clauses *leading to* and predating the closing and settlement. We can only assume confusion in respondents' brief on these issues but, again, that is no excuse, particularly when the facts of record are so clear.

III.

Petitioners' brief in support of reconsideration sets forth numerous grounds for granting certification, each of which fully satisfies the requirements of *R.* 2:12-4. Naturally, we expected respondents to have a different view. What we did not expect—and what we cannot tolerate—is respondents' attempted refutation of petitioners' positions through the use of distortion, deliberate or otherwise. Respondents have chosen not to attack the *validity* of the facts stated by petitioners in their brief on reconsideration. Consequently, those facts stand undisputed.

It is not surprising that Hardwicke so fervently wishes to discourage this Court from closely scrutinizing the within matter. For what Hardwicke possesses in the way of an enormous judgment has been obtained by frequent resort to "litigation from ambush," a technique disfavored by the New Jersey Supreme Court from the date of its inception in 1948.

We believe that once this Court examines the undisputed facts in this case, and recognizes the significant legal issues involved, it will correctly conclude that certification should be granted. If ever a case of importance cried out for final appellate review, it is this one.

Respectfully submitted,

Lum, Biunno & Tompkins
Attorneys for Petitioners-Movants
for Reconsideration
By: William B. McGuire
Of Counsel
Theodore L. Abeles
Of Counsel
William J. Prout, Jr.
On the Brief

WBM/TLA/WJP:jrn

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-995-77

STANLEY SWITLIK and RICHARD
SWITLIK,

Appellants,

v.

HARDWICKE COMPANIES
INCORPORATED, GREAT
ADVENTURE, INC. and
HARDWICKE'S NEW JERSEY
PRESERVES, INC.,

Respondents and
Cross-Appellants.

ORDER FOR
STAY OF
JUDGMENT

Plaintiff Stanley Switlik and additional defendant Richard Switlik (hereinafter "Switliks") having moved to stay execution of certain judgments aggregating approximately $6 million dollars on a counterclaim and cross-claim entered against them in the Superior Court, Chancery Division on behalf of defendants

EXHIBIT D

Great Adventure and Hardwicke's New Jersey Preserves, Inc. (hereinafter "Judgment Holders"), pending appeal by Switliks from said judgments to the Superior Court, Appellate Division, and it appearing that the docketing of said judgments constitutes them a lien on all realty of the Switliks in this state; and Lum, Biunno & Tompkins, Esqs., by Joseph A. Hoffman, Esq., appearing for the Switliks, and Wilentz, Goldman & Spitzer, Esqs., by Frederic Becker, Esq., appearing for Judgment Holders in opposition to said motion, and good cause appearing, it is on this 30 day of December, 1977 ORDERED:

1. Execution by sale of any levy under said judgment made by Judgment Holders on any property of Switliks, real or personal, is stayed pending this appeal or the further order of this court, on condition that Switliks perform the

following conditions of this Order on or before January 25, 1978:

(a) File a supersedeas bond of a surety company licensed to do business in this state in the sum of 1 million dollars;

(b) Assign as further security to Great Adventure, Inc. any interest of the Switliks (excluding any possible interest of the heirs of Wanda Switlik, deceased) in the purchase money mortgage executed by Hardwicke's New Jersey Preserves, Inc. in favor of Stanley and Wanda Switlik, with the interest and principal due thereon to be escrowed pursuant to paragraph 1(c) hereof. Said interest and principal payments are to be placed in an interest-bearing bank account in the names of the escrowees.

(c) Assign as further security to the attorneys for Judgment Holders and Switliks in escrow all choses in action, receivables or securities of any nature of the Switliks other than such as are required to be assigned to the bonding company in connection with the supersedeas bond aforesaid. The escrowees shall agree upon an appropriate custodian bank depository for the escrowed assets at the expense of Switliks. The attorneys shall serve as escrowees without counsel fee unless such fee is allowed by the court against the Switliks for extraordinary and non-customary services by escrowees. With respect to any assets subject to any prior liens, including the marketable securities assigned as security or the bond described in subparagraph

1(a), the Switliks shall execute unto the Judgment Holders a lien to secure the judgments subject to any such existing prior lien.

(d) Execute in favor of Judgment Holders, as further security, a deed or mortgage on any Florida real estate owned by the Switliks, or either of them, or in which either of them has any interest, in such form as to render such instrument recordable under the laws of Florida and pay the expense of taxes or fees for such recording. The Switliks shall affirm or depose that they have no real estate in any other state or give similar security as here ordered as to the Florida real estate.

2. Switliks shall have the right to receive income, interest or dividends accruing on any of the property to be

assigned or transferred to or on behalf of Hardwicke except item 1(b) and shall aply such income in the first instance to pay taxes on and maintain real estate owned by them on a current basis, and to make payments when due on principal or interest on any loans which are secured by a lien prior to that given to the Judgment Holders herein.

3. As as further condition of this stay, Switliks shall:

(a) As further security, agree in writing forthwith not to use their stock rights or official positions in Switlik Parachute Company, or otherwise, to vote for or to act to procure or to agree or acquiesce in any action by said Switlik Parachute Company not in the ordinary course of business.

(b) Obtain, on or before the 1 day of April, 1978, and deliver to

Judgment Holders a report by their certified public accountants of complete and accurate sworn statements by Switliks of their respective assets and liabilities as of the most recent date practicable, which statement shall identify each such asset by description and location and by current or most recent available valuation. If the date specified is too early for a complete report, a provisional one may be submitted subject to correction or modification at the earliest date possible thereafter.

4. Switliks are herewith restrained from the sale, transfer, assignment, encumbering or other disposition of any their assets of whatever nature except as provided elsewhere in this Order, particularly that they may receive and retain income from the property mentioned in

paragraph 2 subject to the conditions therein stated.

5. Either party may hereafter apply on notice for modification of this Order as equity may require or circumstances warrant, including any information which may be disclosed by the reports to be rendered pursuant to paragraph 3(b) hereof, by discovery of the assets of Switliks or otherwise.

FOR THE COURT

/s/ Milton B. Conford
MILTON B. CONFORD, P.J.A.D.

January 13, 1981

Ms. Sally Mrvos, Clerk
United States Court of Appeals
For The Third Circuit
21400 United States Court House
Independence Mall West
601 Market Street
Phialdelphia, Pennsylvania 19106

Re: Richard Switlik and Stanley Switlik; Appellants v. Hardwicke Company, Inc.; Six Flags; Great Adventure, Inc.; et al., Appellees, Docket No. 80-2174: Rule 25 Disclosure Statement

Dear Ms. Mrvos:

This will respond on behalf of Appellees Great Adventure, Inc., Hardwicke Companies Incorporated (incorrectly designated in the caption as "Hardwicke Company, Inc.") and GSC/Six Flags Corporation (incorrectly designated in the caption as "Six Flags") to your letter of January 6, 1981 indicating that the Court required counsel to comply with Rule 25 of the Rules of the United States Court of Appeals For The Third Circuit.

Pursuant to Rule 25 (2), appellee Great Adventure, Inc. advises the Clerk that it is a Delaware corporation and a wholly-owned subsidiary of Pennrec Co., a Delaware corporation, which is a wholly-owned subsidiary of Pennsylvania Company, a Delaware corporation, which in turn is a wholly-owned subsidiary of The Penn Central Corporation, a Pennsylvania corporation. Penn Central Corporation is a publicly owned corporation.

Pursuant to Rule 25(2), appellee GSC/Six Flags Corporation advises the Clerk that it is a wholly-owned subsidiary of Pennsylvania Company. The relationship of Pennsylvania Company to Penn Central Corporation, a publicly-owned corporation, is described in the immediately preceding paragraph.

Pursuant to Rule 25 (3), appellees Hardwicke Companies Incorporated, a publicly-owned corporation, and Great Adventure, Inc. advise the Clerk that Hardwicke Companies Incorporated and The First National Bank of Chicago, a subsidiary of First Chicago Corp., a publicly-owned corporation, have interests in the amended judgments rendered by the Superior Court of New Jersey, Ocean County, Chancery Division, against Stanley Switlik and Richard Switlik on October 24, 1977 nunc pro tunc to October 13, 1977 on behalf of Hardwicke's New Jersey Preserves, Inc. and Great Adventure, Inc. who have been succeeded by merger and change of name by appellee Great Adventure, Inc. Hardwicke Companies Incorporated is entitled to 15% of the proceeds of such judgments and The First National Bank of Chicago is entitled to credit of up to one-half of the remaining proceeds of such judgments as an offset to certain indemnities it has made in connection with the purchase of Great Adventure, Inc. Both corporations share in the expense of the litigation. Great Adventure, Inc. is entitled to the remaining proceeds of the judgments and also shares in the expense of the litigation.

The original and three copies of the within Disclosure Statement, together with Proof of Service on all counsel, are herewith submitted. An additional copy of the Disclosure Statement and of the Proof of Service are also herewith enclosed and I would appreciate your indicating the filing date thereupon and your returning such additional copies to me in the stamped, self-addressed envelope provided.

Thank you for your courtesies.

Very truly yours,

/s/ Frederick K. Becker

Frederic K. Becker

FKB:eh
Enc.

cc: Pellettieri, Rabstein & Altman
(Certified Mail, RRR)
Attention: Neal S. Solomon, Esq.

Babcock & Hennes
(Certified Mail, RRR)
Attention: Peter S. Hennes, Esq.

Daniel J. Sullivan, Esq.